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The Consent of the Governed: Against Simple Rules for a Complex World

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THE CONSENT OF THE GOVERNED: AGAINST SIMPLE RULES FOR A COMPLEX WORLD

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"For every problem there is one solution which is simple, neat and wrong."[1]

Like an intriguing but awkward family heirloom, the legitimacy problem is handed down from generation to generation of administrative law scholars. The nature of our attempts to solve the problem—that is, to reconcile the reality of regulatory government in the United States with the ideals of American constitutional democracy—has varied with the times. In some periods, faith in the promise of new governmental initiatives has inspired conciliatory efforts meant to facilitate the administrative enterprise.[2] In other periods, suspicion about government power in general, or the direction of particular regulatory programs, has bred proposed solutions that were decidedly anti-regulatory.[3] In no period, however, has the energy and intensity devoted to the reconciliation effort been greater than at present.

The 1980s saw the emergence of a rich separation of powers jurisprudence that has been channeled, in this decade, into more focused

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1. Attributed to H.L. Mencken.

2. For example, the first generation of administrative law scholarship minimized the constitutional tension by separating "administration" from "politics" and framing the former as essentially matters of technical expertise and organizational expediency. *See* Nathan D. Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285, 285-94 (1950); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 569-76 (1992). Later, essentially sympathetic scholarly and judicial response to the social, environmental, and safety initiatives of the 1960s and early 1970s produced the interest representation model, which creatively reconceptualized the means by which administrative government would be responsive to the popular will. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1711-62 (1975); *infra* Part III.

3. For example, the pre-World War II activity of the American Bar Association and scholars such as Roscoe Pound—which ultimately impelled adoption of the Administrative Procedure Act ("APA") as a defensive compromise by those committed to the New Deal—sought to bridle administrative activity with tight legalistic curbs, in the name of subjecting regulation to the discipline of the rule of law. *See generally* George B. Shepherd, *Fierce Compromise: The APA Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447 (1986).

attention on strengthening the hand of the President. The notion of strong presidential leadership of administrative government is not, of course, new. If the contemporary regulatory state could not have happened without the New Deal, the New Deal could not have happened without Franklin Roosevelt. Still, the current emphasis on presidential direction of domestic[4] regulatory policy is different in kind, as well as intensity. Increasingly, scholars (and, at times, the judiciary) look to the President not only to improve the managerial competence and efficiency with which regulation occurs but also, and more deeply, to supply the elusive essence of democratic legitimation. The ideological sources drawn upon are diverse—original intent, civic republicanism, public choice theory—but the central argument is consistent: The President, and the President alone, represents the entire citizenry. The President, uniquely, is situated to infuse into regulatory policymaking the will of the whole people.

I argue here that this latest effort at making peace between regulatory government and representative democracy is fatally flawed. Despite the ingenuity and intensity with which strong presidentialism is advanced, it is premised upon a fundamentally untenable conception of the consent of the governed. The "will of the people," as invoked in that effort, is artificially bounded in time, homogenized, shorn of ambiguities—in short, fabricated. It obscures complex problems (recognized elsewhere in administrative law scholarship) of information, prediction, and risk perception. It slides over vexed questions (recognized elsewhere in scholarly literature about democracy) of when leaders should lead rather than follow and of how the act of governing becomes a process in which the collective will is formed, rather than merely implemented.

My counter-proposition is a broad, and perhaps uncomfortably indeterminate one: No single mode of democratic legitimation can serve to mediate between the conflicted, protean, often inchoate will of the people and the modern regulatory enterprise. No single institution or practice is capable of performing the multiple tasks of registering, interpreting, educating, adapting, affording participation, facilitating deliberation, brokering accommodation, and umpiring conflict that are (or at least ought to be) entailed in shaping the public policy of a post-industrialized democracy with an activist regulatory

4. For theoretical and practical reasons, this article does not consider the role of the President in military or foreign affairs—although the domestic/foreign distinction becomes increasingly elusive given the transnational nature of many economic and environmental issues.

government. There are no simple rules for this complex world. Rather, we must necessarily look to a plurality of institutions and practices as contributors to an ongoing process of legitimizing the regulatory state. Each of those institutions and practices will be partial and, of itself, insufficient. Each imposes its own kind of costs on the regulatory process. Each is capable, if overemphasized, of introducing its own kind of distortion.

In sum, I am suggesting that the reconciliatory effort must abandon its yearning for a neat solution to the legitimacy problem and, instead, come to terms with "the ugliness of democracy."[5] Whether actively exhilarated by the challenge, or merely resigned to the inescapable messiness, we scholars should understand the task of administrative law as an ongoing, and necessarily adaptive, inquiry into the optimal form and role for the variety of institutions and practices that hold legitimating potential.

I. SEEKING THE WILL OF THE PEOPLE

> "What do 'those who are continually declaiming about *the people, the people* . . . mean by the people?'"[6]

PROLOGUE: THE VISION OF THE PRO-PRESIDENTIAL LITERATURE

In the most powerful of the recent legitimation literature,[7] the will of the people plays a central role. The Grail-like object of a constitutional quest emphasizing "accountability" and "avoidance of faction," it shines as the genuine essence of democracy in luminous contrast to the shabby speciousness of special-interest politics.[8] It is the virtuous transcendence of the "seditions of classes" and of that regionally dominated politicking which is "guaranteed to be charac-

5. JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS 157 (1995).

6. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 398 (1969) (quoting THE BALTIMORE MARYLAND JOURNAL, Aug. 3, 1787).

7. The principal works in the corpus include Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive,* 48 ARK. L. REV. 23 (1995) [hereinafter *Normative Arguments*]; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); and Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Lawrence Lessig & Cass R. Sunstein, *The President and The Administration*, 94 COLUM. L. REV. 1 (1994).

8. *See, e.g., Normative Arguments, supra* note 7, at 64 n.105 (distinguishing "the general national will" from local, state, and national factional interests which advocate "policies at variance with those the nation as a whole might want"). On the "central" constitutional goals of accountability and avoidance of faction, see, for example, *Normative Arguments, supra* note 7, at 37-47; Lessig & Sunstein, *supra* note 7, at 94, 102-03.

terized by the most gross and irremediable conflicts of interest."[9] It is the "entire American people," "thinking and acting as one nation."[10]

The will of the people (thus envisioned) holds out the promise that, if we could just reestablish its primacy in public policymaking, we could reclaim several fundamental values endangered in the contemporary regulatory state. It is the source of wisdom, for the "national majority coalition" will "by its very nature, be likely to be more moderate, temperate, and just" than any policy agenda emerging from special interest politics.[11] It is the sine qua non of liberty, for unless government power is directed by the national constituency, the coercion of regulation is collective servitude to the self-interest of factions.[12] It is the wellspring of legitimacy, for with our loss of faith in neutral, technocratic administration, any possible constitutional justification for insulating regulators from democratic control has also vanished.[13]

And finally, it is urged, the means of achieving this deeply appealing end is strong presidentialism.[14] The President is uniquely (and, in

9. *Normative Arguments*, *supra* note 7, at 70.

10. *Normative Arguments*, *supra* note 7, at 36, 73-74. See *id.* at 36-38, 47, 58-59, 64 n.105, 67, and 73-74, for examples of emphasis on the national will of the whole community, as opposed to regional and parochial interests.

11. *Normative Arguments*, *supra* note 7, at 67. *See also id.* ("the wise and benevolent preferences of the national majority").

12. *See, e.g.*, Lessig & Sunstein, *supra* note 7, at 105-06 (the Constitution protects liberty "in large part by limiting the authority of factions[;]" "relevant risks to liberty" are aggravated unless the voice of the national constituency counters factional influence over administration); *cf. Normative Arguments*, *supra* note 7, at 81, 83-84 (arguing *for* a universal line-item veto because "the representative of the nation's latest majority electoral coalition should have to approve any redistributive line or item that a congressional majority favors" and *against* independent agencies because of "not only the risk of industry or interest group capture" but also "capture by geographic congressional committee interests"). *See generally* Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 CARDOZO L. REV. 201, 210 (1993) ("It is only through faction that private parties can capture the coercive mechanisms of government and use those powers to oppress their fellow citizens.").

13. *See, e.g.*, Lessig & Sunstein, *supra* note 7, at 100-02 ("In a world where administration is conceived as apolitical, granting administrators relatively independent authority could be thought to raise few constitutional issues. . . . [Now, however, administration] can no longer be understood to be neutral, or scientific. Politics is at its core, in the sense that value judgments are pervasive and democratic controls on policymaking are indispensable.").

14. Strong presidentialism is marked by commitment to two basic principles: (1) centralization of control over execution of the laws exclusively in the President (the "unitary executive" principle) and (2) an expansive conception of "execution" that comprises all activity implementing a statute (or, at least, all non-adjudicatory activity) after completion of the Article I lawmaking process. Hence, it targets all formal barriers of "independence" between the President and any government official exercising discretionary power who neither adjudicates nor legislates—although specific proposals vary in the degree to which they accept countervailing justifications for departing from absolute presidential control. *Compare* Lessig & Sunstein, *supra* note 7, at 106-10, 117-18 (condemning "independence" in policymaking functions for most agencies but accepting independent counsel), *with Normative Arguments*, *supra* note 7, at 81-86, 90-95 (condemning both). Within the critique of independent agencies, no firm consensus yet exists about

most versions of the argument, intentionally) structured to hear and act upon the voice of all the people.[15] His singularity avoids collective action problems[16] and allows the citizenry an unambiguous focus for political responsibility.[17] His universal electoral base enables him to implement the will of the whole by counteracting narrowly regional interests and by raising the costs of capture by factions.[18] Chosen by "the nation thinking and acting as one nation,"[19] he is the only official with the strength, energy, and incentive to direct public policy on behalf of the entire community.[20] In sum, responsiveness, virtue, and competence flow from strengthening presidential leadership of the administrative enterprise. In him, the Constitution and the regulatory state may finally become reconciled.[21]

whether the President can actively direct particular official discretion, reactively nullify a disobedient action, or merely fire a recalcitrant official. *See* Calabresi & Rhodes, *supra* note 7, at 1167.

15. Strong presidentialism typically comes in an originalist package. *See, e.g.*, Calabresi & Prakash, *supra* note 7; Calabresi & Rhodes, *supra* note 7; Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991 (1993). Indeed, when Professors Sunstein and Lessig disputed this historical reading, they met vehement challenge, *see* Calabresi & Prakash, *supra* note 7, even though they had enthusiastically argued for strong presidentialism as the most faithful "translation" of original constitutional commitments. The most recent contribution to the literature, Steven G. Calabresi & Christopher Yoo, *The Unitary Executive During the First Half Century*, 47 CASE W. RES. L. REV. (forthcoming 1998) is the first in a promised four-article series examining "practice and tradition over the whole of the last 208 years," with a view to showing that presidents have not acquiesced in departures from the original unitary executive design.

16. *See, e.g.*, *Normative Arguments*, *supra* note 7, at 36 (noting that "[t]he essential ingredient to combating the congressional collective action problem is the President's national voice because he, and he alone, speaks for the entire American people").

17. *See, e.g.*, *Normative Arguments*, *supra* note 7, at 42-43 (noting that plurality "tends to conceal faults and destroy responsibility" and "can conspire . . . to create ambiguity about the locus of blame"); *see also* Lessig & Sunstein, *supra* note 7, at 98 ("immunizing [agencies] from Presidential control . . . would segment fundamental policy decisions from direct political accountability and thus the capacity for coordination and democratic control"); *cf.* Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1795, 1799 (1993) (condemning citizen suits as not "compatible with democratic principles": "A single executive can implement the laws with greater dispatch and, at the same time, stand accountable for all implementation efforts.").

18. *See, e.g.*, *Normative Arguments*, *supra* note 7, at 38 (asserting that because he represents the nation as a whole, "a foreign or domestic faction or interest group will find it far more costly to 'purchase' the President and his national constituency"); *cf.* Lessig & Sunstein, *supra* note 7, at 105-06 ("because the President has a national constituency—unlike relevant members of Congress, who oversee independent agencies with often parochial agendas—it appears to operate as an important counterweight to factional influence over administration."). For an example of similar faith in the President's unique ability to defeat faction, see Miller, *supra* note 12, at 201; Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*, 15 CARDOZO L. REV. 313, 320-21 (1993).

19. *Normative Arguments*, *supra* note 7, at 74.

20. *See, e.g.*, *Normative Arguments*, *supra* note 7, at 98-99 ("Presidential majoritarianism and . . . nothing else" will "represent majority interests against regional raids on the national treasury.").

21. *See, e.g.*, Lessig & Sunstein, *supra* note 7, at 4 ("[I]n the face of post-New Deal developments, those founding commitments [to] avoidance of factionalism, political accountability, a

This account of constitutional goals and political processes poses several important issues for debate.[22] Here,[23] I wish to challenge the account at only one, albeit the most elemental, point: The will of the people upon which it rests has neither factual nor constitutional reality. Let me be clear that I am not making the extreme claim, resting on Arrow's Theorem, that "the notion of a popular will is incoherent, or that the popular will is itself incoherent, whichever you prefer."[24] Rather, I am (somewhat) more modestly insisting that the will of the people, as invoked in the recent pro-presidential literature, cannot be defended on the descriptive level as an apt or useful picture of citizens' engagement in contemporary regulatory government. Neither can it be justified on the normative level as simply incorporating a construct of the "consent of the governed" which, even if highly artificial in fact, is nonetheless constitutionally authentic because adopted by the Founders. Whatever is being pursued by strong presidentialism, it is not merely an imaginative adaptation to modern times of an orthodox, uncontroversial vision of American constitutional democracy.

degree of centralization in government, and expedition in law enforcement . . . would be compromised by limiting Presidential power over the administration of the laws.").

Indeed, the claim is typically put even more strongly: Strong presidentialism is our *only* hope for constitutional legitimation. *See, e.g.*, Lessig & Sunstein, *supra* note 7, at 86 ("Under current circumstances, a strong unitary executive is the best way of keeping faith with the most fundamental goals of the original scheme."); *Normative Arguments*, *supra* note 7, at 34, 37, 59 (condemning the contemporary regulatory system as "an unmitigated redistributive disaster that . . . can only be ameliorated by . . . a much stronger and more unitary presidency that President Reagan and his legal advisors ever thought to ask for[,]" and by emphasizing the President's "unique claim to legitimacy" as the only one "accountable to a national voting electorate and no one else").

22. The originalist case for strong presidentialism is challenged in, inter alia, Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 Nw. U. L. REV. 1346 (1994); and Abner S. Green, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994). Particularly thoughtful, more broad-ranging challenges appear in: Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827 (1996); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161 (1995) [hereinafter *Political Accountability*]; Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596 (1989) [hereinafter *Independent Policymaking*]. On the specific point of presidential vulnerability to special interest politics, see Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 19-21 (1994).

23. This paper is part of a larger project assessing various implications of the strong presidenialist movement for administrative law.

24. JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 155 (1989). Professor Kenneth Arrow's work appears to show that even if the members of a group have consistent preferences, there is no nondictatorial collective decisional procedure that will uniformly produce minimally rational and consistent outcomes. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 38-62 (1991).

"Solving" the legitimacy problem requires, as the first step, a more fundamental inquiry into what it could mean for the modern regulatory state to be guided by, and responsive to, the will of the people.[25] The sections that follow attempt to begin this inquiry by exploring several characteristics of our individual and collective decisionmaking that complicate any effort to identify with assurance what citizens "want" of contemporary public policymakers. These characteristics—heterogeneity, complexity, evolution, and the dilemma of leading vs. following—pose particular challenges for those who would privilege the President as the voice of We, the People.

A. Heterogeneity

> "The name of American, which belongs to you in your national capacity, must always exalt the just pride of patriotism more than any appellation derived from local discriminations. With slight shades of difference, you have the same religion, manners, habits, and political principles."
>
> George Washington, Farewell Address, September 17, 1796[26]
>
> "Our rich texture of racial, religious and political diversity will be a godsend in the 21st century. . . . Will we be one Nation, one people, with one common destiny, or not? Will we all come together, or come apart?"
>
> Bill Clinton, Inaugural Address, January 20, 1997[27]

The contrast between the Farewell Address of our first President and the Inaugural Address of our current President suggests that we now perceive ourselves a far more diverse society than at the Founding. To be sure, Washington's assertion of homogeneity may have been largely rhetorical, born more of his wish for a unified American socio-political consciousness than of his confidence in its existence. Less than a decade earlier, Federalists and Anti-Federalists had vehemently asserted radically divergent political and social visions; within a decade, fierce conflict between Federalists and Republicans would produce reverse Court-packing,[28] politically motivated judicial im-

25. Hence, I share Peter Shane's insistence that a weakness of the strong presidentialism literature is "that it gives little sustained attention to what 'accountability' means." *Political Accountability*, *supra* note 22, at 196; *see also* Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 718-21 (1993) (challenging the accountability claims of advocates of a more unified, parliamentary form of government).

26. A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 205, 207 (1897).

27. 33 WEEKLY COMP. PRES. DOC. 60, 61 (Jan. 20, 1997).

28. The two-week spate of judicial "reform" legislation by the outgoing Federalist Congress that created Marbury's notorious justice-of-the-peace position also reduced the size of the Supreme Court from six to five, in order to deny an appointment to the incoming Republican

peachments,[29] and similar evidence of fairly profound differences in "political principles."[30] Still, we can recognize that significant disagreement about appropriate government ends and means has always marked American public life, yet nevertheless identify several factors that have made us a society whose plurality is *now* less likely to be resolved into a unified expression of political will.

For one thing, diversity of citizen viewpoint may have been better mapped, at the Founding, by local political units such as the states. The Constitution accorded these units a significant and carefully orchestrated role in the construction of representation at the federal level.[31] To the extent that they were fairly good proxies for important competing political and social visions, they may have been more successful—at the beginning—in functioning as channels for the convergence of views (or at least filters of the cacophony) at the level of national policy setting.[32] In any event, it requires no historical speculation to observe that the kinds of voices that "count" have proliferated significantly since the Founding. The achievement by people of color and women of first a de jure, and increasingly a de facto, voice in the process of governing has redefined the political meaning of "the people." One need not essentialize race and gender to be confident that expanding the franchise has significantly diversified the voice of the citizenry. Moreover, from the gender and racial consciousness-raising and the environmental and consumer grass-roots activism of the 1960s, to the rise of the religious right in the 1980s, contemporary American public discourse has been marked by both greater expectation of, and increased sophistication at, participation in the political process by a wide range of citizens experiencing themselves as group-affiliated.[33]

president. *See* CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 1789-1835, at 185-89 (3d ed. 1947).

29. *See id.* at 269-97.

30. *See id.*

31. *See infra* Part II. On the Constitution's dichotomous conception of "'We the People' (nationally understood) *and* the several states (i.e., 'We the People' thereof) as independent political communities," see Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 129 (1996).

32. Anti-Federalists condemned the nationalism of the Constitution on grounds that government at the state level was more responsive to differences in the People's interests, habits, etc. that ought to inform policymaking. *See* WOOD, *supra* note 6, at 526-27. Madison, discussing the House of Representatives in the Federalist Papers, describes the states as exhibiting considerable *intra*state uniformity of interests and affairs, but great *inter*state diversity; he predicts that this will reverse over time, with greater intrastate complexification and more interstate assimilation. *See* THE FEDERALIST NOS. 53, 56 (James Madison).

33. *See* Allan J. Ciglar & Burdett A. Loomis, *The Changing Nature of Interest Group Politics*, *in* INTEREST GROUP POLITICS 1 (A. Ciglar & B. Loomis eds., 1983); Joseph A. Pika, *Interest*

The proposition that a single official "representative" could capture this heterogeneity and meaningfully translate it into specific public policy mandates is, at best, counterintuitive. To the extent that the recent legitimation literature appears to be making precisely this claim on behalf of the President, it would appear to be resting (at least implicitly) on one of two sorts of arguments.

The first, which might be dubbed "utopian republicanism," would argue that this heterogeneity manages, through public debate and allied political processes, to resolve itself into consensus on most (or, at least, most significant) issues.[34] This consensus is then available to the representative consciously elected by all the people to act upon their collective will. It is difficult to imagine anyone seriously claiming that this is how contemporary American political life actually works, so perhaps we ought to understand the vision of a representative of the national will as aspirational rather than descriptive. But, at this point, proponents of such an argument need to lay far more conceptual groundwork. Persuasively to assert, first, that the achievement of actual national consensus on most significant domestic policy issues is the democratic ideal towards which we should be striving and, second, that enhancing the role of the President is the best way of achieving it, requires considerable discussion about both the appropriateness of the end and the likely success of the means.[35]

A modified (perhaps, more realistic) version of the utopian republican argument might insist that certain elements of dissention—"special interests" or "factions"—need not be taken into account in the quest for a unified national will because they fail to join in the good faith process of consensus building. But such a modification simply adds another point at which theoretical and practical elaboration is necessary: Who "counts" as a good faith participant trying to achieve full participation in the political and social community, rather

Groups and the Executive: Presidential Intervention, *in* INTEREST GROUP POLITICS 298, 304-07 (A. Ciglar & B. Loomis eds., 1983). Some commentators trace the origins of this political group-consciousness back further, to industrialization. *See, e.g.*, Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 SOC. PHIL. & POL'Y 196, 218-19 (1991).

34. The phrase "*utopian* republicanism" is meant to differentiate this vision from the "mainstream" republican revival literature. *See generally* Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

35. A good theory may make idealistic assumptions about people's motivations, but even if it does, it should hold on to a sense that in the real world, even after deliberation, people will continue to disagree in good faith about the common good, and about the issues of policy, justice, and right that we expect a legislature to deliberate upon.

Jeremy Waldron, *Legislation, Authority, and Voting*, 84 GEO. L.J. 2185, 2189 (1996).

than a narrowly self-interested faction trying to capture political power for selfish ends?[36]

A second, very different, sort of presidentialist argument for dealing with the challenge of heterogeneity might assert that the American commitment to democratic governance requires only substantial, not universal, consensus among citizens on issues of public policy. In other words, the "will of the people" means, more precisely, the will of a majority of the people.[37] At first blush, this response sounds not only more realistic than the utopian republican argument, but also fairly orthodox. The President, uniquely, represents the "nation's latest majority electoral coalition,"[38] and the consensus of the majority is a constitutionally sufficient basis for legitimate governance (at least so long as policy decisions do not infringe on rights protected by the Constitution from simple-majoritarian redefinition). On closer examination, however, the blush fades rapidly. Most fundamentally, the orthodoxy of this argument is only skin deep. As Part II discusses in greater detail, the complex representational structure originally established by the Founders cannot be reduced to nationwide majoritarianism expressed in election of the President.[39] And, if we are compelled to depart from the original construct—because, for example, delegation of policymaking power has fundamentally altered the originally intended patterns of political initiation and response[40]—it is far from self-evident as a matter of political theory that simple majoritarianism,

36. Consider, for example, Professor Calabresi's discussion of the controversy over homosexuals in the military during the first Clinton administration. In his account of "Clinton's ill-conceived policy initiative," gays and lesbians occupy the role of a "not very popular special interest group" whose claims were at odds with the views of the national constituency. *Normative Arguments*, *supra* note 7, at 52 & n.80. It would be helpful to know what normative device is being used to sort the virtuous sheep from the factional goats in such stories about public deliberation. Unless the only virtuously non-factional political action is that taken by the lone individual, standing fiercely independent of any collective effort to define public values and commitments, then some theory of the role of groups in contemporary society is required before we can make productive use of the vaunted Madisonian concern with "faction." *See generally* Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988); *cf. Independent Policymaking*, *supra* note 22, at 621 (arguing that organizations dedicated to environmental protection or civil rights enforcement "do not represent 'factions' in the Madisonian sense because their ideological appeal is to the long-term common interest, not to momentary passion or self-interest").

37. Professor Calabresi, in particular, shifts freely between "the general national will" (or "policies at variance with those the nation as a whole might want") and "the preferences of the national majority" (or the "nation's latest majority electoral coalition"). *Normative Arguments*, *supra* note 7, at 64 n.105, 67, 81.

38. *Id.* at 81.

39. For a broader argument that American constitutional democracy cannot properly be equated with majoritarianism, see STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 56-63 & accompanying notes (1990).

40. *See infra* Part III.

simply expressed through a single representative voice, is the "best" interpretation of democracy.[41]

The "national majority consensus" argument is also vulnerable on a more practical level. In the first place, presidential politics can be successfully conducted with the support of considerably less than a majority of the citizenry. As we know from recent experience, presidents can be and have been elected with considerably less than 51% of the popular vote.[42] Hence, even without discounting this by the number of citizens (1) eligible to vote but not registered, and (2) registered but not voting,[43] it is obvious that the "will of the (majority of the) people" in this argument actually means the will of a portion of a majority of the people.

In addition, even if we were persuaded that the constitutionally relevant citizen voice is that of "whatever plurality of those who

41. For example, political theorists have recognized that a system based on majority rule can be destabilizing if majorities are not fairly fluid. *See, e.g.*, AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION 28 (1977); *cf.* Richard Gunther & Anthony Mughan, *Political Institutions and Cleavage Management*, *in* DO INSTITUTIONS MATTER? 272, 274 (R. Kent Weaver & Bert A. Rockman eds., 1993) (using cross-cultural comparisons to argue that "political institutions are a significant force facilitating peaceful regulation of conflict insofar as they encourage consensual rather than majoritarian patterns of elite interaction").

Consolidating power in the President may simply heighten the stakes, if groups in society come to recognize that their political fortunes hinge on election every four years of a single official. *Cf.* Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, *in* THE FAILURE OF PRESIDENTIAL DEMOCRACY 3, 18-21 (Juan Linz & Arturo Valenzuela eds., 1994) (making a cross-cultural argument that the winner-take-all nature of presidential government makes it vulnerable to breakdown in circumstances of deep political cleavage within a society); Gunther & Mughan, *supra*, at 290 (observing that U.S. presidents who have sought to nullify congressional opposition by, inter alia, arguing that Congress is defending "special interests" counter to the wishes of "the people" pursue a potentially destabilizing strategy of majoritarianism).

42. Bill Clinton's 43% in 1992 was not an outlier. *See* HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 111-15 (4th ed. 1994). Buchanan (in 1856) got 45%, *see id.*, Wilson (in 1912) 42%, *see id.*, and Nixon (in 1968) 43%, *see id.* Polk, Taylor, Garfield, Cleveland (each time), Wilson (in 1916), Truman, and Kennedy were each elected with between 45% and 50% of the popular vote. *See id.* Abraham Lincoln appears to hold the record, winning the presidency with only 39.8% of that vote. *See id.*

Of course, the Electoral College system works to disguise the narrowness of the presidential victory; Lincoln received 59% of the electoral vote while Clinton (in 1992) received 69%. *See id.* Perhaps the greatest recent beneficiary of this institutional sleight-of-hand was Ronald Reagan, whose 1980 "landslide" victory of 489-49 votes in the Electoral College rested upon a bare majority of 50.7% of the popular vote. *See* LYN RAGSDALE, VITAL STATISTICS ON THE PRESIDENCY Table 3-1 at 99-100 (1996); Robert A. Dahl, *Myth of the Presidential Mandate,* 105 POL. SCI. Q. 355, 355 (1990).

43. About 49% of eligible voters cast a presidential ballot in 1996. FEDERAL ELECTION COMMISSION, VOTER REGISTRATION AND TURNOUT (visited July 15, 1997) <http://www.fec.gov/pages/96to.htm> (reporting that about 74% of those of voting age registered; about 66% of those registered voted). Hence, Bill Clinton's winning 49% popular vote actually represented the support of about 24% of the national electorate. The comparable figure for Ronald Reagan's 1980 landslide victory is estimated at 27%. *See* NELSON W. POLSBY & AARON WILDAVSKY, PRESIDENTIAL ELECTIONS 176 (7th ed. 1988).

choose to register and vote is sufficient to elect a president in a given election," there remain formidable problems in translating those citizens' votes into their position on policy issues. Whenever the object of the political exercise is adopting a package rather than resolving a single issue—as when citizens must choose among candidates who run on multi-faceted policy platforms—there is a bundling problem. In order to get the policy "sticks" they value most highly, voters have to take whatever other sticks come in the bundle. Thus, progressives voting in 1996 got stuck with Clinton's support of welfare "reform," just as many who voted for Reagan or Bush got stuck with a more extreme position on abortion than they personally espoused.[44] The point is not that policy bundling is democratically illegitimate, but rather that it precludes any facile translation of election results into "the people's will" on specific policy issues—and the problem is especially acute for presidential elections precisely because the issue bundles presented to the electorate are greater in size and complexity than those in any other race.[45] Indeed, bundling is but one species of the generic interpretational challenge posed by voting: End decisions often are not self-explanatory.[46] As we know well from a variety of contexts—whether it be trying to understand why Ross Perot got 19% of the vote in 1992, why incumbents lost in unprecedented numbers in 1994, or why the jury acquitted O.J. Simpson—knowing how people voted is not the same as knowing why. Even if we are not prepared to go so far as David Dow's assessment that "reading electoral politics is only slightly less fatuous than reading tea leaves,"[47] these formidable interpretational questions at least place a considerable burden of proof on those who would assert that a discernible national majority consensus on significant public policy issues is given voice in the single moment of choosing the President.

44. On the latter, see *Political Accountability*, *supra* note 22, at 197 & n.155.

45. "It is possible for candidates to get 100 percent of the votes and still have every voter opposed to most of their policies, as well as having every one of their policies opposed by most of the voters." POLSBY & WILDAVSKY, *supra* note 43, at 292.

46. *See generally* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2144-45 (1990) (discussing "the expressive dimension of choices, namely, the *meanings* that outcomes have as a result of having been chosen in distinctive ways, in specific contexts, and for particular reasons").

47. David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 47 (1990).

B. Complexity

> "The voices of citizens matter in a democracy, but understanding what these voices are truly saying is difficult."[48]

In their role as citizens, as in other aspects of their daily lives, people maintain positions that are in tension, if not actual conflict. Thus, voters through the 1980s relentlessly insisted that they wanted less government and more environmental protection.[49] In the 1990s, we profess a strong commitment to achieving more affordable, broadly available health care, yet we simultaneously insist on our desire to retain a high degree of individual freedom of choice.[50] Indeed, one might see in the remarkable post-World War II American pattern of "divided government"—i.e., the voters selecting one party to hold the White House and the other party to hold one or both houses of Congress—the institutional expression of an electorate of intractably divided minds.[51]

48. HIBBING & THEISS-MORSE, *supra* note 5, at 1.

49. For a compilation of opinion polls throughout the 1980s on support for environmental regulation, see *Political Accountability*, *supra* note 22, at 197 n.156, 198. Indeed, these conflicting commitments continue in the 1990s. *See* Dick Thompson, *Congressional Chain-Saw Massacre*, TIME, Feb. 27, 1995, at 58 (reporting a Time/CNN poll in which 88% of respondents identify the environment as either one of our most important problems or a very important problem, while simultaneously supporting such anti-regulatory measures as eradicating unfunded mandates (57%) and compensating landowners if regulation diminishes land values (64%)); *cf.* R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 257-58 (1992):

> We tell EPA, for example, to protect the public health with an adequate margin of safety, but advise it not to spend too much money or put anyone out of work. We tell them to use the best scientific evidence, but refuse to let them pay enough to recruit top-flight scientists, and then we tell them, "By the way, do it within 90 days." We expect bureaucrats to account for every penny of public money, to record every conversation with a member of an interest group, to show that they have treated everyone equally, and to consider all the relevant information and alternatives—but to stop producing all that red tape and being so damn slow.

50. According to compiled results from 44 nationwide surveys conducted between 1992 and 1994, approximately 72% of respondents believe that a health care crisis exists in America. *See* Robert J. Blendon et al., *The American Public and the Critical Choices for Health System Reform*, 271 JAMA 1539, 1539 (1994). Support for universal coverage is strong: 73%-86% consider it to be a major goal of health care reform. *See id.* at 1540. In addition, 50% of respondents place affordability among the top priorities for any restructuring of the current system. *See id.* However, only 29% are willing to have their choice of health care providers curtailed in order to meet the goals of health care reform. *See id.* at 1542.

51. *See, e.g.*, POLSBY & WILDAVSKY, *supra* note 43, at 184 (arguing, from recent election patterns, that "Americans take advantage of the opportunity to diversify their political portfolios").

In the century between Pierce and Truman, only two incoming presidents (Hayes and Cleveland) faced an opposition majority in at least one house of Congress; in that same period, midterm elections gave the opposing party control of at least one house fewer than a dozen times. *See* RAGSDALE, *supra* note 42, at 370-72 tbl. 8-1. By contrast, beginning with Eisenhower, six of the nine presidents have had to deal with a Congress at least one house of which was controlled by the opposition. *See id.* Moreover, the trend towards divided government appears to be accelerating. Between 1946 and 1998, 32 of 52 years (62%) represent years of divided government; between 1980 and 1998, the comparable figure is 16 of 18 years (89%). *See* Theo-

To some extent this phenomenon reflects problems of information, prediction, and options, discussed below.[52] To some extent, it reflects a desire to have one's cake and eat it too, particularly at the moment when citizens are sending messages to government officials about all the good things they want from a new regime. But it undeniably complicates the task of the public official, conceptualized as medium for the people's will. Which message from the national spirit shall the medium convey? Even if we allow the high priest valid leeway to "interpret" the sometimes cryptic mutterings of the spirit, as the content of the simultaneous messages diverges, the notion of mere interpretation is strained to the breaking point. Bill Clinton made some attempt to respond to the demands for both broad health care availability and individual choice, but ultimately (and perhaps fatally) chose the former over the latter. Ronald Reagan chose to hear and implement the call for less government, with no apparent concern about the competing call for more environmental protection. Whatever might be said in favor of such presidential judgment,[53] it cannot be satisfactorily accounted for within a simple model of representation which looks, for democratic legitimacy, to the Chief Executive because he is uniquely situated to hear and act upon the will expressed by the national constituency.

The challenge of complexity runs deeper than the problem of citizens who send mixed signals to their elected representatives because they have inadequate information to recognize contradictory demands, insufficient civic responsibility to convey their "real" preferences, or inordinate hope that all things are possible with the right political savior. Our intelligent layperson's experience with the world tells us what experts in cognitive psychology confirm: Values and commitments exist at several levels of generality, and on multiple scales that do not readily reduce to a single hierarchical ranking of preferences.[54] We *voice* incompatible expectations and dissonant demands to public officials because we *hold* incompatible expectations and dissonant demands. In our daily lives, we mediate among these competing commitments through methods better described by the incremental improvisation of "muddling through" than the integrated

dore J. Lowi, *President v. Congress: What the Two-Party Duopoly Has Done to the American Separation of Powers*, 47 CASE W. RES. L. REV. (forthcoming 1998) (manuscript at 7, on file with author).

52. *See infra* subpart D.

53. *See infra* subpart D on leading vs. following.

54. For a more extended and nuanced discussion of this phenomenon, see Pildes & Anderson, *supra* note 46, at 2143-88.

elegance of algorithmic logic. We reconcile our stubborn inconsistencies, if at all, through a dynamic process of contextualizing, trial and error, identifying and assessing alternatives—in sum, working at the best accommodation possible in the particular situation. Consider again the current health care debate. Although the process for arriving at the best balance of choice, cost, and coverage at the national level may have broken down for the moment, many of us must engage these issues on a more personal scale, as individual employers use a variety of carrots and sticks to move workers toward managed-care plans. When my employer required me to choose between conventional coverage and a less expensive managed-choice plan, my experience of the ensuing decisional process could not possibly be reduced to a linear, rational calculus of acquiring all reasonably available information, making educated predictions about likely relative costs and benefits, refining my judgment about how much "choice" is worth to me, and then applying that judgment to check off the plan that had thus emerged as the "best" reconciliation of conflicting commitments for my family. To be sure, such information-gathering, prediction, and judgment-refinement played an important role.[55] But at least as important was a far more ramified, less determinate process of considering what sorts of tradeoffs were appropriately demanded or acceded to; examining what options had been raised or ignored; redefining expectations of reasonable respect for personal privacy—in a sense, charting a new line between the individual and the collective.[56] Even now that the process is complete, I cannot capture the results in a neat formula, "If X, Y, and Z exist, then I prefer A; otherwise B," nor could I reduce my experience in resolving the issue for my family to a set of pat instructions to my representative about how the national debate ought be resolved. And, when that debate is renewed, the challenge of complexity is not simply that my experience in mediating

55. For example, I soon ferreted out the "wisdom" among faculty and other professionals at the university that families with lots of generally healthy children would do "better" with managed-choice because that plan generously covered preventive care like well-visits and eye exams; on the other hand, anyone with more exotic health problems should choose conventional coverage because one would not want to be limited to the treatment network in a small upstate New York community.

56. For example, the university's "cheaper," "broader" managed-choice plan presented several issues that, at least for me, defied framing as simply, "How much am I willing to pay for choice?" These included the need for one's primary care physician—who must be an M.D.—to approve alternative forms of treatment like acupuncture and chiropracty; the particularized refusal to allow women to select their gynecologists as primary care physicians; the decision to cover pregnancy and abortion under both plans, but birth control only under the managed-choice plan; and the need to appear before and persuade an independent contractor review panel that you or your family *really* required counseling or other psychiatric services.

among the competing values and commitments will be multiplied by 260 million. Some citizens will have different conceptions about which values and commitments are implicated, so that the framing of the policy questions becomes as much a matter to be "worked through" as the solutions.[57] An elected official surveying such a scene would require a godlike capacity for resolving complexity to be able to divine "the preferences of the national majority"[58] on the issue.

C. *Evolution*

> "[T]he action of opinion is continuous, that of voting occasional, and in the intervals between . . . changes may take place materially affecting the views of the voters."[59]

The preceding observations about complexity suggest that, whenever issues of public policy implicate incommensurable values, we would expect to see citizens' views undergoing modification and development. Indeed, even on issues that do not demand us to reconcile fundamental values and commitments, it would be remarkable if the will of the people were a static phenomenon. As elected officials and their pollsters have long recognized, when an issue moves to the top of the political agenda, the dynamics change. Apathy about the issue (rational or not) dissipates; the level of information available (or, at least, attended to) increases; alternative framings are proposed and critiqued. In some sense, the issue is not "the same as" it was prior to sustained political attention.[60]

The claim that the President, by virtue of his national electoral status, uniquely represents the voice of the entire nation particularly ignores the evolutionary quality of the popular will. Indeed, as described in some of the legitimation literature, the quadrennial election takes on the super-normal quality of an Ackermanian constitutional moment.[61] To be sure, political scientists have repeatedly observed

57. For example, you may disagree completely with my finding troubling gender implications in the "no gynecologists" rule, perceiving instead that gynecologists are indistinguishable from cardiologists, urologists, or any other specialists who are barred from serving as the primary care physician. This would be an instance of what Pildes & Anderson call "political incommensurability"—that is, a fundamental disagreement over how to define the problem. *See* Pildes & Anderson, *supra* note 46, at 2162-63.

58. *Normative Arguments*, *supra* note 7, at 67.

59. GEORGE GALLUP & SAUL FORBES RAE, THE PULSE OF DEMOCRACY: THE PUBLIC-OPINION POLL AND HOW IT WORKS 18 (1940) (quoting James Bryce).

60. For a provocative account of how public sentiment changed over the course of debate about Clinton's health care reform proposals, see THEDA SKOCPOL, BOOMERANG: CLINTON'S HEALTH SECURITY EFFORT AND THE TURN AGAINST GOVERNMENT IN U.S. POLITICS (1996).

61. See, for example, Professor Calabresi's argument for why the President is more truly representative of "the nation as a whole" than is a concurrent majority of both houses:

that voters approach presidential elections differently than other elections.[62] From this observation, however, it is a considerable leap of political faith to the conclusion that the people thereby confer upon the President some extraordinary four-year dispensation to speak their will for them. Recent presidents have learned, as a matter of hard political reality, about the pitfalls of acting as if their election represented a continuing "mandate."[63] It is an even longer leap of constitutional faith to presume that the consent of the governed as expressed through the act of choosing a president constitutes the democratically relevant will of the people. To be sure, it would not be unheard of for law to insist upon a snapshot—rather than a video—version of "intent." Many legal rules privilege intent at a fixed moment in time: when the statute was enacted, the treaty ratified, the contract formed. However, at a stage in our history when public law, in the form of broadly delegative regulatory statutes, seems conspicuously to embody a formal commitment to fluidity, it is particularly odd to embrace a static and artificial construct of the will of the people as defined once every four years in the moment of selecting the President. Perhaps if that were the original constitutional design, we might be committed to this peculiar conception of representation. However, as discussed in the next Part, it was not.[64]

Alternatively, the claim might be that the President is uniquely adept at correctly reading and reflecting the evolution of the popular will. If this is the claim, the verdict at this point would have to be "Not Proved." The gain in perspective that comes from distance from the voters also brings a loss of immediacy in hearing and understand-

> Voters elect presidents to be *leaders* who will speak for the whole nation and who will offer a vision of the future. . . . The congressional majority is an agglomeration of local interests that happens to add up to 51 senators and 218 representatives. The presidential majority, on the other hand, is a real 51% majority of the Electoral College, *chosen once every four years when the nation is thinking and acting as one nation.*

Normative Arguments, *supra* note 7, at 73-74 (second emphasis added). On the parameters of the "Ackermanian constitutional moment," see Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

62. *See, e.g.*, POLSBY & WILDAVSKY, *supra* note 43, at 184-86. In selecting a president, voters appear to place greater emphasis on the state of the national economy as a whole than on their own particular past economic well-being, and on perceptions about the candidate's general ideology than on agreement with his specific regulatory or economic policy positions. The literature is surveyed in Seidenfeld, *supra* note 22, at 20-21 & nn.115-16.

63. *See, e.g.*, Gunther & Mughan, *supra* note 41, at 289 (discussing Reagan's waning success after enactment of 1981 legislative program); POLSBY & WILDAVSKY, *supra* note 43, at 289 ("Even in a landslide, the mandate is at best a temporary, equivocal matter."); *cf.* Fitts, *supra* note 22, at 856-57 (discussing literature documenting systematic loss of public support, for all presidents, from first year into third year of term).

64. *See also* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 736-38 (1988).

ing their concerns. The broadened comprehension from seeing the entire national policy picture and hearing the entire national electorate carries with it an increase in the "noise" from the heterogeneity and complexity discussed above. And then there is the matter of incentives. Another characteristic that distinguishes the President from all other federal elected officials—at least thus far—is having an absolute limit to his term of office. The tendency of presidents to look increasingly, as their tenure proceeds, to how history (rather than their immediate fellow citizens) will assess their performance in office ought to caution us against blithely equating the representational antennae of second-term presidents with those of first-term ones. Indeed, even a first-term president may not function as a particularly sensitive barometer of evolving public viewpoint. As Michael Fitts has thoughtfully pointed out, there can be high political costs to a president who is perceived as opportunistically adjusting his positions to play to the opinion polls.[65]

D. Leading vs. Following

> "This leads us to the uncomfortable position that . . . some of us know the good better than others of us."[66]

This last observation about our at-best-ambivalent reaction to a president whose policy positions shift in response to shifting popular sentiment raises yet another significant—and significantly complicating—characteristic of American democratic governance. A common expression of the democratic ideal is that public policymaking should reflect and implement the values and desires of the citizenry: "A legitimate regime should give the people what they want . . . ."[67] But even putting aside all the previously identified challenges to identifying

65. Professor Fitts traces this phenomenon to two aspects of popular reaction to our presidents: (1) the tendency to "evaluate the president according to a standard of moral assessment appropriate for individuals, rather than institutions," Fitts, *supra* note 22, at 872, and (2) the more general finding of leadership studies that the ultimate impact of a leader often depends on the particular "story" that he is perceived to embody. *See id.* at 873. A president who changes his position is in danger on both fronts. "*Good individuals* with strong moral values are not supposed to change positions in light of changing political coalitions, although political institutions and parties can and should do so." *Id.* at 875. And the leader who changes his "story" with shifting political currents soon has no credible story to tell.

Peter Shane makes the point more colloquially: "A President whose every view tracked the majority in the latest relevant opinion poll would presumably be so conspicuously lacking in any internal compass as to call into question at least the President's capacity for leadership, not to mention his mental health." *Political Accountability*, *supra* note 22, at 198-99.

66. Peter L. Strauss, *Review Essay: Sunstein, Statutes, and The Common Law—Reconciling Markets, The Communal Impulse, and the Mammoth State*, 89 MICH. L. REV. 907, 920-21 (1991).

67. Pildes & Anderson, *supra* note 46, at 2128.

"what the people want," we do not really believe that this is the measure of a legitimate democratic government. Those advocating government intervention to prevent racial segregation, or gender discrimination, or obtaining an abortion, do not consider their actions outside the bounds of democracy simply because a majority of citizens may have a taste for discrimination or a belief in a woman's right to choose.

It is not only in such "easy" cases—where one may plausibly argue that some higher law (constitutional or natural) trumps simple-majoritarian will—that we resist the simple equation of democratic legitimacy with giving the people what they want. Many public choice scholars are critical of Congress, particularly the House, precisely because of its asserted structural bias towards giving constituents exactly what they want.[68] To be sure, public choice is a very particular conception of democratic processes, the premises and conclusion of which are hardly uncontroversial, but the point can be made in less politically loaded terms. We readily allow that government policymakers need not accede to citizen preferences formed in ignorance of important information—and we are prepared to tease "lack of information" pretty finely. Obviously, officials can legitimately discount public opinion on technically arcane issues, or on issues where national security or similar collective interests prevents the full airing of information. But beyond the obvious, there is highly respectable argument that policymakers can legitimately discount expressed preferences if those expressing them have not been forced to come to terms with what they are willing to give up ("pay") to get the desired outcome.[69] To come closer to home for legitimation of the regulatory state, administrative law remains conflicted about how regulatory policymak-

68. *See, e.g.*, Barry R. Weingast et al., *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89 J. POL. ECON. 642 (1981). *Cf.* Michael Fitts & Robert Inman, *Controlling Congress: Presidential Influence in Domestic Fiscal Policy*, 80 GEO. L.J. 1737 (1992) (discussing the theory and practice of universalism in Congress, with particular emphasis on budgetmaking). This same criticism plays an important role in the strong presidentialism literature. *See, e.g.*, *Normative Arguments*, *supra* note 7, at 34-38, 58-67; Lessig & Sunstein, *supra* note 7, at 105-06.

69. *See* W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK 261 (1992). On the use of "willingness to pay" as a measure of preferences, see generally Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 75-80 (1995).

This frames the point in rational choice terms. One could make a similar, though differently cast, observation under the rubric of complexity discussed earlier. Any time a policy issue is singled out from its matrix of relevant values and commitments, there is danger that people will respond "out of context," in ignorance of how actual resolution of the issue implicates competing values and commitments that demand accommodation, modification, and evolution of what we "want."

ing ought to deal with the gap between expert and popular perception of risk. We know, as psychological fact, that even fully informed people will prefer greater risk to lesser risk so long as it is familiar, voluntarily assumed, perceived as more within personal control, seen as "fairly" distributed, etc.[70] Yet, few of us are prepared to regard such proven, informed citizen preferences as democratically dispositive of appropriate governmental policy on carcinogens in food, the development of nuclear energy, or the minimum safety specifications for automobiles.[71]

We do not have a stable, coherent theory of when our leaders should lead and when they should follow.[72] Given the difficulty this question poses for representative democracy, the lack of a fully articulated answer is not surprising. In the most fertile and intense period of political theorizing in our history—the Revolutionary period culminating in ratification of the Constitution—the question of whether and when elected officials are bound to take "instructions" from their constituents was a deeply contested and imperfectly resolved aspect of the concept of "representation."[73] We know that in some measure the test of a legitimate democratic regime is whether it "gives the people what they want." But the test is incomplete because based on the incomplete premise that the act of governing is a passive, mechanistic aggregation of citizen preferences, the legitimacy of which derives from full and fair counting. We also know that part of the legitimate realm of democratic governance is the shaping of values and the forging of commitments—and sometimes, the deliberate determination by

70. *See* Paul Slovic et al., *Fact Versus Fears: Understanding Perceived Risk* in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 463 (Daniel Kahneman et al. eds., 1982); *see also* HOWARD MARGOLIS, DEALING WITH RISK: WHY THE PUBLIC AND EXPERTS DISAGREE ON ENVIRONMENTAL ISSUES 21-47 (1996); Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562, 595-98 (1992) (discussing role of equity in risk assessment); Pildes & Sunstein, *supra* note 69, at 36-39, 52-59.

71. *See, e.g.*, Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027 (1990); Pildes & Sunstein, *supra* note 69, at 60-64. Perhaps the most interesting question, from a democratic legitimation perspective, is whether government can educate citizens about the gap between expert and lay risk perception. *See, e.g.*, William D. Ruckelshaus, *Risk in a Free Society*, 14 ENVIR. L. RPTR. 10190 (1984) (describing EPA campaign to educate community about risk levels and economic consequences of bringing a copper smelter plant into compliance). *See generally* Pildes & Sunstein, *supra* note 69, at 89-94. Including citizen education among the goals of the regulatory process does not necessarily presume that the expert assessment is the "right" one for an educated citizenry to elect to pursue.

72. *See, e.g.*, JAMES S. FISHKIN, THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY (1995); HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967); SHIFFRIN, *supra* note 39, at 63-69.

73. *See, e.g.*, WOOD, *supra* note 6, at 188-96, 366-72, 379-83. *See generally* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 209-38 (1988).

our representatives to defy the will of the people in the interest of the community as a whole, or a vulnerable subsection of the community.

Even if strong presidentialists were prepared to say with assurance when it is democratically legitimate for government to lead rather than follow, the question remains whether responsibility for this leadership is appropriately concentrated in a single pair of hands. Both supporters and opponents of a stronger presidency agree that the President is uniquely situated among public officials—by institutional structure, custom, and position in a media-dominated culture—to take the preeminent role in shaping citizen views on public policy issues.[74] But it collapses "is" with "ought" to translate dominance-in-fact into preeminence-as-of-right. As a matter of policy, one would be hard pressed to argue from political history that Americans routinely select as their president that individual best suited "to play the part of a Universal Providence and set all things right."[75] As a matter of constitutional expectation, one would be equally hard pressed to argue from the intellectual history of the Founding that the President was intended to function as the republic's domestic policy czar. To that intellectual history I now turn.

II. THE ORIGINAL SOLUTION

> "[T]he whole people of the United States are to be trebly represented in [the new Constitution] in three different modes of representation."
>
> John Dickinson, 1787[76]

In the extraordinary generation and refinement of American political theory that occurred in the 1770s and 1780s, no problem received greater attention than how to create and maintain governing bodies that could satisfactorily speak for the people. Reviewing the intellectual history of the Founding, Gordon Wood concludes, "No political conception was more important to Americans in the entire

74. *See, e.g.*, JAMES W. DAVIS, THE AMERICAN PRESIDENCY 136-56 (2d ed. 1995); SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP (2d ed. 1993); Gary J. Miller, *Formal Theory and The Presidency*, *in* RESEARCHING THE PRESIDENCY 289, 311-17 (George C. Edwards, III et al. eds., 1993). On the advantages and perils of the President's unique ability to act as a "focal point," see Fitts, *supra* note 22.

75. William Howard Taft, criticizing Teddy Roosevelt's expansive view of Executive power, *quoted in* John P. ROCHE & LEONARD W. LEVY, THE PRESIDENCY 25 (1964); *cf.* Fitts, *supra* note 22, at 856 (citing studies showing that, "[s]ince 1965, public approval ratings for presidents have generally declined" and noting "[t]he decline in presidential popularity" as "one of the most well-documented trends in recent American politics").

76. John Dickinson, *Letters of Fabius*, *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 162, 178 (Paul Leicester Ford ed., 1888), *quoted in* WOOD, *supra* note 6, at 546.

Revolutionary era than representation."[77] The evolution of the idea was complex, and early Americans' views on the subject were hardly monolithic, but the essential trend seems clear: Dominant political thought in the Founding era moved away from the idea that The People are especially embodied in one particular part of government, to embrace a more complex and self-consciously nonexclusive notion of how the will of the people informs all parts of government.

The first sustained American grappling with the problem of representation came, of course, in the struggle with King George and Parliament over governance of the colonies.[78] Conventional British political theory held that "the people" participated in government through the House of Commons. Representation there was not actual; not only was the franchise severely limited (and did not extend at all to the American colonies), but also the geographical allocation of seats was wildly disproportionate to actual population density. Rather, the concept was one of virtual representation,[79] premised on a conception of society in which the (common) people were a homogenous group with a common set of interests—at least for purposes of participating in government with the aristocracy and the King. Because the people, in their political identity, were understood as an organic whole, their representatives could be chosen by some part of the whole without any loss in ability to speak for the interests of all.[80] The radical Whig challenge to this received wisdom advocated a strong form of actual representation involving not only a broadened franchise and reformed apportionment but also shorter terms of office and term limits, so that representatives would be forced to return frequently to the people.[81] Such ideas resonated strongly with colonists ever more alienated from and unhappy with British rule.[82]

Beyond the structural question of how the people's representatives ought be chosen and kept in sympathy with their interests, there

77. WOOD, *supra* note 6, at 164; *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 203-43 (1996). On the Founders' consciousness of the centrality—and true revolutionariness—of their ideas about representation, see WOOD, *supra* note 6, at 595-97.

78. *See* MORGAN, *supra* note 73, at 239 *passim*.

79. *See id.* at 240-41.

80. *See* WOOD, *supra* note 6, at 174-76.

81. *See id.* at 26-27, 140. Ironically, Wood observes, this perpetually reconstituted legislature, tied closely to the people through frequent turnover, would have prevented the House of Commons from playing more than a sporadic, remedial, exceptional role in setting government policy—a point eventually appreciated by the Founders. *See, e.g.*, THE FEDERALIST NO. 63 (James Madison) (arguing the "paradoxical" point that less frequent elections will make the Senate more wise and responsible representatives).

82. *See* MORGAN, *supra* note 73, at 241-43; WOOD, *supra* note 6, at 176-80.

was the deeper issue of the role played by those representatives in government. In the British constitution,[83] the people-as-represented-in-Parliament were only one of the three orders of society whose participation was required for legitimate government. The King (participating personally) and the aristocracy (participating as the House of Lords) made up the other elements of a "mixed" constitution, in which the structure of government paralleled and embodied the structure of the larger society.[84] Jack Rakove argues that, from the British experience, the Americans initially inherited an understanding of the role of representation as essentially defensive: "[T]he great purpose of representation was to prevent the Crown and its subordinates from acting arbitrarily, without securing the consent of the people's representatives."[85] In other words, rather than being a positive source of policy generation, the representative assembly was the mechanism through which the people protected themselves from infringement of their customary rights and liberties by the King. Rather than being the way in which the people ruled, representation was the way in which they voiced their consent to be ruled.[86] In Georgian Britain, the House of Commons failed this quintessential representative function because it had been corrupted, by the Crown's use of patronage and influence, into a compliant toady.[87] The mixed constitution, so perfect in theory for its capacity to control power through the creation of separate and counterbalancing bodies in government, had been subverted in practice by executive undermining of legislative independence.[88] This understanding of the function of, and the dangers to, representation laid the groundwork for the radically anti-executive cast of the early state constitutions.[89]

83. The British constitution was not only the most familiar to the Americans but also the one extolled by the influential Montesquieu as the most nearly perfect of government organizational schemes. *See* THE FEDERALIST No. 47 (James Madison).

84. *See* WOOD, *supra* note 6, at 197-206. *See generally* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 33-35 (1967) (discussing the content and evolution of the mixed government theory).

85. RAKOVE, *supra* note 77, at 209.

86. *See id.* at 208-09.

87. *See id.* at 209-10; WOOD, *supra* note 6, at 143-48. Indeed, these practices had been brought to America by royal colonial governors who "had not only attempted to establish electoral districts and apportion representation [in the colonial assemblies] but, more frightening, had sought to manipulate the representatives of the people by appointing them to executive or judicial posts, or by offering them opportunities for profits through the dispensing of government contracts and public money." *Id.* at 157.

88. *See* WOOD, *supra* note 6, at 33-34, 42.

89. "Their own colonial experience and their Whig theory of politics had taught them only too well where the source of despotism lay. 'The executive power,' said a Delaware Whig, 'is ever restless, ambitious, and ever grasping at encrease of power.'" *Id.* at 135. *See also* RAKOVE, *supra* note 77, at 210-14, 249-50.

When the Americans set out to structure their own government—and the first wave of this energy went into the state constitutions during the Confederation era—they used and modified these various received notions of the nature and function of representation. They created powerful—in some states, virtually omnipotent—legislatures, the lower house of which reflected radical Whig principles about actual representation: broad (for the times) franchise; generally proportional assignment of seats; minimal qualifications for officeholding; and a large number of representatives with short terms of office and restrictions on reelection.[90] They deliberately disabled the executive from undermining the independence and accountability of the legislature: They withheld from their governors the powers to appoint, to assemble or prorogue the legislature, and to have any voice in legislation; they deprived them of a substantial independent power base through such devices as selection by the legislature and the creation of a strong executive council.[91] When they came to designing the upper house of the legislature, however, the first Americans encountered the greatest difficulty in adapting received wisdom to their unique circumstances.[92] Both Parliamentary practice and the theory of a mixed and balanced constitution strongly urged bicameralism. However, in the absence of a distinct social order like the British aristocracy, what representative function did the upper house serve? The answer that emerged—imperfectly developed and treacherous in implementation—was that a small and select upper house would embody America's "natural" aristocracy of talent, providing wisdom, educated experience and mature judgment.[93] In most instances, this vision was implemented by limiting the franchise and/or the qualifications for the upper house to those with a specified amount of property.[94]

Experience under the early state constitutions was disillusioning.[95] The representational experiment with a strongly democratic lower house was, if anything, too successful. To the minds of many of

90. "If one maxim reflected Americans' ideas of representation . . . it was the belief that a representative assembly 'should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them.'" RAKOVE, *supra* note 77, at 203 (quoting John Adams). *See also* MORGAN, *supra* note 73, at 245-47.

91. *See* WOOD, *supra* note 6, at 135-50. "The Americans, in short, made of the gubernatorial magistrate a new kind of creature, a very pale reflection indeed of his regal ancestor." *Id.* at 136. "To constitute a weaker executive would have been nearly impossible." RAKOVE, *supra* note 77, at 252.

92. *See* RAKOVE, *supra* note 77, at 250-52; WOOD, *supra* note 6, at 206-22.

93. *See* WOOD, *supra* note 6, at 208-09. For general discussion of the American dilemma of seeking a natural aristocracy of talent for political office, see MORGAN, *supra* note 73, at 288-306.

94. *See* MORGAN, *supra* note 73, at 248-50; WOOD, *supra* note 6, at 214-18.

95. *See* WOOD, *supra* note 6, at 403-13.

those who would become the most influential Federalists, virtually anyone could be—and was—elected to legislative office, regardless of their lack of education, ability, or stature in the community.[96] The frequency of elections and the imposition of term limits meant that initial shortcomings in training and understanding could not be meliorated by experience.[97] These deficiencies in deliberative ability and practice were exacerbated by populist tendencies for local citizen groups to give binding instructions to their representatives and vigorously to insist upon the power of recalling them.[98] At the same time, the American situation had redefined the function of the representative assembly, such that these perceived defects in wisdom and competence took on particular urgency. Lacking a King and his ministers—and having scotched the possibility of the governors' evolving in that direction—the Americans witnessed their legislatures necessarily take on the role of active crafter of public policy, rather than mere defender of the people's rights as against their rulers. Indeed, the legislatures became the rulers, thereby transforming the "abstract principle" of legislative supremacy into "a factual description of a functioning government."[99] And the problems these fledgling legislatures were forced to address—how first to wage a war for independence, and then to recover from it—would have challenged even the most experienced and able statesmen.[100]

At the same time, the structure of the other branches came under increasing criticism.[101] From the more populist Anti-Federalist perspective, the upper houses had become too distanced from the people

96. *See id.* at 475-83; *see also* MORGAN, *supra* note 68, at 247-49.

97. *See* RAKOVE, *supra* note 77, at 218-19. Following the radical Whig maxim "Where *annual election* ends, *tyranny* begins," every state constitution except South Carolina's provided for annual elections. WOOD, *supra* note 6, at 166.

98. *See* WOOD, *supra* note 6, at 188-96, 319-43. These representational characteristics—short terms, the power of recall, and the practice of instructing—were also found in the Continental Congress. *See* RAKOVE, *supra* note 77, at 208.

99. RAKOVE, *supra* note 77, at 217. "It would be difficult to exaggerate the importance of this shift in the responsibility of government. For centuries the government had been identified with the executive or the Crown . . . ." WOOD, *supra* note 6, at 163 n.2.

100. Professor Rakove's account of the legislative debacles of the period (which loomed so large in the minds of the Founders of the Constitution) is more sympathetic than many others. He sees a socio-political moment in which failure was almost inevitable:

> No assembly could distribute the burdens of war equally, or avoid persuading some that their interests were being treated unjustly. Nor could the assemblies escape the inevitable criticisms, resentments, and simply ornery complaints that arose because so much legislation affected property. As Americans increasingly questioned whether legislators truly represented (or sympathized with) their interests . . . they were driven less by the logic of popular sovereignty than by complaints about the inability of the legislature to manage all the economic evils the war had produced.

RAKOVE, *supra* note 77, at 217.

101. *See* WOOD, *supra* note 6, at 407-08, 430-38.

and, with their formal linkage to property ownership, now overtly stood for an elite class of "the few" as against "the many."[102] From the perspective of many Federalists who would become influential in the framing of the Constitution, the senates were not distanced enough. The natural aristocracy had not successfully dominated them, and so they were unable to add the broad experience, dispassionate judgment, and reflective wisdom (as well as sensitivity to property rights) required for the formation of sound public policy.[103] In light of this newfound disillusionment with legislative supremacy-in-fact, the weakness of the executive was increasingly perceived as a critical problem. The governors could serve neither as a check to hasty and improvident acts of the popular assembly nor as a positive source of policy direction and perspective. Similarly, the absence of an independent judiciary, capable of impartially adjudicating controversies and keeping the popular assembly within the bounds of the constitution, was increasingly noted.[104] With both legal authority and political strength held almost exclusively by the legislature, the early state constitutions were eventually seen as violating fundamental principles of separated and counterbalancing powers, to the detriment of the people's interests and well-being.

The Framers thus faced the delicate task of curing the perceived defects of these first American experiments in representative government, without recreating aspects of the British system—an executive-King and a permanently-aristocratic upper house—that most Americans found unacceptable. This resistance was not only social—a leveling determination not to recreate the "artificial" (because inherited) entrenched hierarchical orders of British society[105]—but also political. The unhappy experience with near-absolute legislative supremacy created the painful dilemma of how to control representative government

102. *See id.* at 237, 503. Compare the explanatory statement of the Convention of the revised Massachusetts Constitution of 1780: "The House of Representatives is intended as the Representatives of the Persons, and the Senate of the property of the Common Wealth." *Id.* at 218.

103. *See* MORGAN, *supra* note 73, at 252-54; WOOD, *supra* note 6, at 215-16 (views of Jefferson and Madison), 507.

104. Professor Wood explains that the lack of an independent judiciary was directly linked to the early Americans' extreme fear of executive domination. Not only was adjudication initially conceptualized as part of the power of the Crown, but also the experience with colonial judges had persuaded them that judges easily became creatures of executive manipulation. *See* Gordon S. Wood, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION 49, 50-56 (1997); WOOD, *supra* note 6, at 154-61. On the evolving call for a strong and independent judiciary, see Wood, *supra* note 6, at 259-305, 407, 453-63; Gordon S. Wood, *The Origins of Judicial Review*, 22 SUFFOLK U. L. REV. 1293, 1303-06 (1988).

105. *See* WOOD, *supra* note 6, at 481-82.

without employing measures that seemed anti-representational, and hence profoundly inconsistent with the Revolution.

The solution came in a major reconceptualization of the nature and meaning of representation. The British legacy understood the people as being in government by virtue of their representation in Parliament; the early state constitutions acted upon that understanding by making the people-in-government (the popular legislative assembly) supreme. The discovery that the people, thus envisioned, could do harm to themselves was hard to understand and even harder to remedy without abandoning the fundamental commitment to a democratic republic.[106] The essential conceptual shift that occurred in the course of framing and ratifying the Constitution was to relocate the people outside of government.[107] Put more conventionally, the Constitution presumes that sovereignty resides in the people, who create government by delegating power to the several organs of government.

This conception is now so familiar as to make it difficult for us to appreciate its radical and indispensable brilliance at the time. It enabled defenders of the Constitution to answer the seemingly unanswerable charge that the proposed federal structure entailed an unnatural and impossible division of sovereign power between the states and the national government—the *imperium in imperio* argument.[108] This problem evaporates once sovereignty is understood as residing in the people, who may apportion it among various governing organs in whatever forms and quantums they choose. And this key to the riddle of the new Constitution's *vertical* allocation of power could be applied to explain and justify its *horizontal* allocation of power as well. By reconceptualizing all government power—whatever its nature or function—as a delegation by the people, the Framers were in a position to insist that the people would now necessarily participate in each branch of the new national government through their representative agents. As Gordon Wood puts it, "All parts of the government were equally responsible but limited spokesmen for the people, who remained as

106. American troubles . . . came . . . from the misuse by representatives of powers assumed in the name of the people. . . . The problem, it now appeared, was twofold: first, in the name of the people, to set limits on the actions of the people's representatives, and secondly, if possible, to broaden the vision of the representatives themselves, without destroying the local, subject character that made them representative.

MORGAN, *supra* note 73, at 255.

107. "The true distinction between [earlier republics] and the American governments lies *in the total exclusion of the people, in their collective capacity*, from any share in the *latter* . . . ." THE FEDERALIST NO. 63 (James Madison).

108. *See* WOOD, *supra* note 6, at 524-32, 545-46.

the absolute and perpetual sovereign . . . ."[109] In this paradigm shift, the lower house lost its role as exclusively embodying the popular will, and hence its claim to special representative status.[110] Understanding it as merely one of the people's representatives not only made sense of the early states' experience —i.e., a particular agent might not always serve the people well—but also permitted the new Constitution to craft an authentically representational remedy for the ills of legislative supremacy-in-fact: The people could create and empower additional agents, who "became rulers and representatives of the people at the same time,"[111] and through whom could be accomplished the desired diffusion and counterbalancing of power.[112]

This new conception of how government gives voice to the people's will enabled the Framers to create—and, during the ratifying debates, to defend—a complex set of representative institutions that reflected lessons learned from the state constitutional experience. In marked contrast to our contemporary habit of collapsing the legislature into a single entity, this representational construct was then understood as having three quite distinct components:[113]

• The House of Representatives most directly continued the strong democratic tradition of the early lower houses: relatively large size;[114] direct popular election, with a intentionally broad franchise defined by reference to the franchise "of the most numerous Branch

109. *Id.* at 599; *see also* MORGAN, *supra* note 73, at 255-61.

110. The powers of the people were thus never alienated or surrendered to a legislature. Representation, in other words, never eclipsed the people-at-large, as apparently it did in the English House of Commons. . . . The representation of the people . . . was acutely actual, and always tentative and partial.

WOOD, *supra* note 6, at 599-600.

111. *Id.* at 546.

112. Separation of powers, whether describing executive, legislative, and judicial separation or the bicameral division of the legislature (the once distinct concepts now thoroughly blended), was simply a partitioning of political power, the creation of a plurality of discrete governmental elements, all detached from yet responsible to and controlled by the people, checking and balancing each other, preventing any one power from asserting itself too far.

Id. at 604; *see also id.* at 550-51:

> Because the Federalists regarded the people as 'the only legitimate fountain of power,' . . . no department was theoretically more popular and hence more authoritative than any other. . . . This being the case, it was not inconsistent with republican theory for the people through their constitution to strengthen the executive and judicial departments at the expense of the legislative.

113. On the practice, during the ratification debates, of describing the new government as "three branches elected by the people"—and meaning thereby the House, Senate and President—see *id.* at 561-62.

114. Professor Rakove recounts the dramatic intervention by George Washington that accomplished a last-minute enlargement of the size of the House, to better secure "the rights & interests of the people." RAKOVE, *supra* note 77, at 228.

of the State Legislature";[115] a short, two-year term of office, but without the heretofore typical limitation on terms served; very minimal qualifications for office in terms of age and status.[116] Federalist hopes for a better sort of government from this familiarly structured representational body lay in the expanded size and scope of national politics: Widen the field, they believed, and there would naturally emerge a better sort of representative than had been seen in the states.[117] Apportionment of Representatives among the states was to be based on actual population, adjusted decennially, but each state remained free to determine (at least in the first instance) whether Representatives would be elected by district or at large.[118] In a power allocation with its roots in radical Whig theory, the Constitution left in the hands of this body the exclusive power to originate "All Bills for raising Revenue."[119]

• The Senate was constructed as a very different sort of representative body. Although the Convention ultimately rejected vigorous pleas by Hamilton and others that Senators be given life tenure and

115. U.S. CONST. art. I, § 2, cl. 1. Insisting on the importance of a representative body that possessed not only "'the *force*'" but also "'the *mind* or *sense* of the people at large,'" influential Federalists including Madison and Wilson argued strenuously, and successfully, against proposals to have the House elected by the state legislatures. RAKOVE, *supra* note 77, at 221-22 (quoting Convention Records).

116. 25 years of age, a 7-year citizen, merely an "inhabitant"— not even a resident—of the state when elected. *See* U.S. CONST. art. I, § 2, cl. 2.

117. When once an efficient national government is established, the best men in the country will not only consent to serve, but also will generally be appointed to manage it; for, although town or county, or other contracted influence, may place men in State assemblies, or senates, or courts of justice, or executive departments, yet more general and extensive reputation for talents and other qualifications will be necessary to recommend men to offices under the national government—especially as it will have the widest field for choice, and never experience that want of proper persons which is not uncommon in some of the States.

THE FEDERALIST No. 3 (John Jay); *see also* THE FEDERALIST No. 10 (James Madison) (stating that in a large republic, the "proportion of fit characters" will be greater "and consequently a greater probability of a fit choice"; "the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters"). On the Federalists' faith in the capacity of a large national republic to accomplish the "filtration of talent," see WOOD, *supra* note 6, at 506-18. *See also* MORGAN, *supra* note 73, at 267-70, 277; RAKOVE, *supra* note 77, at 218-27.

118. Small states in particular chose to have all their Representatives elected at-large. *See* RAKOVE, *supra* note 77, at 224. Professor Rakove points out the peculiarity of the Founders' leaving so many of the mechanics of selection up the states, given the Federalist obsession with the structuring of representation. *See id.* at 222-25. Indeed, one prominent Anti-Federalist attack emphasized that nothing in the Constitution requires states to be divided into districts, or Representatives to reside in the district they represent, or even elections to be decided by majority vote. *See id.* at 231. Eventually, Congress intervened to prohibit at-large election of Representatives, *see* Act of Aug. 8, 1911, Pub. L. No. 5, 37 Stat. 13, *superseded by* Act of Dec. 14, 1967, Pub. L. No. 90-196, 81 Stat. 581 (codified at 2 U.S.C. § 2c (1994)), and the actual construction of districts has acquired complex constitutional overtones.

119. U.S. CONST. art. I, § 7, cl. 1. On the English roots, see WOOD, *supra* note 6, at 241-42.

required to possess substantial property,[120] the final configuration still presented a significant contrast to the House: small size; selection by state legislatures rather than by direct popular election of any sort;[121] a remarkably long six-year term (also without limit on repetition);[122] age and status qualifications for office which, though still quite modest, signaled the desire for more mature and experienced citizens;[123] apportionment by state rather than population.[124] It was given a share in the ever-controversial power of appointment, as well as in the conduct of foreign affairs.[125]

• As a representative institution, the presidency has the most unusual structural features.[126] The four-year term of office falls midway between the Representative's and the Senator's. While there was no formal limit on terms served, George Washington—whose anticipated selection as the first President is often said to have heavily influenced the Convention's framing of the presidency[127]—promptly set the cus-

120. *See* WOOD, *supra* note 6, at 503-04, 553-59; *see also* RAKOVE, *supra* note 77, at 224-26.

121. *See* U.S. CONST. art. I, § 3, cl. 1. Appointment of the Senate continued until 1913, when the Seventeenth Amendment created the present system of direct popular election. For discussion of various constitutional implications of this change, see Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347 (1996).

122. The length of term was mitigated at the institutional level by a staggered system placing one-third of the seats at risk every two years. At the same time, staggered election increases institutional stability by rendering the Senate an effectively continuous body in contrast to the House, which must fully reconstitute itself every two years. *See* THE FEDERALIST NO. 63 (James Madison).

123. Thirty years of age and nine years a citizen. *See* U.S. CONST. art. I, § 3, cl. 3. The average life span in 1789 was 35.5 years, according to data collected for Massachusetts and New Hampshire. *See* NATIONAL SCIENCE FOUNDATION, EXTENDING THE HUMAN LIFE SPAN: SOCIAL POLICY AND SOCIAL ETHICS 1 (Bernice L. Neugarten & Robert J. Havighurst eds., 1977). Even allowing for the impact that high infant mortality would have had on this "average" life expectancy figure, it seems obvious that thirty years of age would have represented very considerable maturity at the time of the Founding.

124. During the debate over ratification, Federalists repeatedly focused on the states' role in determining the components of the Senate as giving it a distinct representational character that would distinguish it from, and allow it to serve as a check upon, the House. *See, e.g.*, THE FEDERALIST NO. 63 (James Madison). *See generally* WOOD, *supra* note 6, at 558-59.

125. The Senate's unusual (for the time) representational structure and its possession of these powers led even some Federalists to apprehend conspiracies between the Senate and the President. *See* WOOD, *supra* note 6, at 519-20. Anti-Federalists were appalled that "[t]ogether the President and the Senate held all the executive and two-thirds of the legislative power; in treaty making they possessed the whole legislative power, and jointly they appointed all civil and military officers." *Id.* at 521.

126. This may reflect the particular difficulty the Convention delegates had in formulating and reaching consensus on views about the presidency. As Professor Rakove puts it, "[T]he longer they discussed the executive, the more puzzled they grew . . . ." RAKOVE, *supra* note 77, at 256. *See generally id.* at 256-68.

127. *But see id.* at 244 (questioning this received wisdom).

tom of a two-term limit that survived until 1940.[128] Qualifications for office, though still relatively minimal, require more than any other public office in terms of maturity and citizen status.[129] The method of selection is the most peculiar and the most apparently attenuated from direct democratic control: a college of electors apportioned effectively by population, whose own method of selection rests solely in the discretion of the state legislatures, whose members must cast their votes in their states without ever assembling as a body (to prevent cabal), and whose existence is so evanescent that it dissolves forever once the ballots are cast.[130] Completing the core set of interlocking powers over domestic policymaking—which force the three primary representational institutions to find a common rhythm before moving government forward—the President was given the power to convene and adjourn the legislature, a qualified veto over legislative proposals, and the power to appoint subject to concurrence of the Senate.

So brief an account invariably oversimplifies the political theory of the Framing; as Professor Rakove emphasizes, the making and ratification of the Constitution "involved processes of collective decision-making whose outcomes necessarily reflected a bewildering array of intentions and expectations, hopes and fears, genuine compromises and agreements to disagree."[131] Nonetheless, it seems safe to say that nothing could be further from the "original understanding" than the notion that one part of government—one representative—speaks, in a privileged way, the will of the people. Rather, the theory of represen-

128. And which, after Roosevelt died, was promptly revived as law by the Twenty-Second Amendment in 1951.

129. Thirty-five years of age, a natural born citizen, and 14 years' residence. *See* U.S. CONST. art. II, § 1, cl. 5. On the meaning, in historical context, of this age criterion, see *supra* note 123.

130. *See* U.S. CONST. art. II, § 1, cl. 3. On the extreme difficulty the Convention had with the method of presidential selection, see RAKOVE, *supra* note 77, at 259-60, 264-66.

Both Jack Rakove and Ted Lowi suggest that the Founders actually did not expect that the electoral college system would routinely produce a winning majority; rather, selection of the President would typically require the default mechanism, eventually set as the House (voting by state rather than per capita) choosing among the five top candidates (a number reduced to three by the Twelfth Amendment). *See* Lowi, *supra* note 51 (manuscript at 4); RAKOVE, *supra* note 77, at 264-66. In this scenario, the electors would have functioned essentially as a nominating committee, and popular democratic control over selection of the President would have been somewhat less attenuated—a somewhat surprising outcome, given the Federalists' deep suspicion of popular democracy. *See generally* Monaghan, *supra* note 31, at 169-73 (reviewing democracy-restraining aspects of the Founding); WOOD, *supra* note 6, at 626 (endorsing the view of Progressive historians "that the Constitution was in some sense an aristocratic document designed to curb the democratic excesses of the Revolution"). *But cf.* MORGAN, *supra* note 73, at 273 (arguing that Madison and his friends strongly supported direct popular election of President and Senate because of faith that the size of constituencies in national elections would yield better results than had been seen in the state governments).

131. RAKOVE, *supra* note 77, at 6.

tation adopted in the Constitution was a polyphonic one: multiple voices speaking of and for the people, each simultaneously constituting real representation, all forced to achieve some degree of unison with the others if government is to act, none (either singly or in concert) capable of exclusively containing the people's will.

III. WHERE FROM HERE?

"As our case is new, so we must think anew, and act anew."[132]

The rise of the administrative state has profoundly disturbed the complex representational structure originally designed to accomplish the task of defining domestic public policy. Broad delegation of policymaking authority in regulatory statutes has inverted traditional patterns of initiation and response. From their originally contemplated role as initiators of policy, the House and Senate now often occupy a reactive role, responding in formal and informal ways to policy generated by agencies. From his originally contemplated role as check upon hasty and imprudent legislation, the President as chief administrator now often forces Congress into the position of checking policy specified by the executive.[133] Article I, § 7 sets up an essentially conservative policymaking process: Any change from the legal status quo requires an extraordinary coalition of political will in the form of either a concurrence of House and Senate and President or, if the President will not concur, a bicameral supermajority.[134] Now, the

132. Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-1865, at 393, 415 (Don E. Fehrenbacher ed., 1989).

133. Consider, for example, the interbranch dispute over the abortion gag rule fueled by the decision in *Rust v. Sullivan*, 500 U.S. 173 (1991). The federal grant program for family planning clinics was almost twenty years old when interpreted by the Bush administration to forbid health professionals from giving women any information about abortion—even if they specifically ask for it. The Supreme Court sustained the new rule, relying heavily on *Chevron* deference. *See id.* at 184. Frenetic activity ensued in Congress. Bills to reinstate the prior, long-standing interpretation passed quickly in both houses, but President Bush was immovable. Although the Senate easily overrode the veto, the House fell a few votes short. And this was where the issue remained until one week after Bill Clinton took office, when he directed the Secretary of HHS to suspend the gag rule. *See A Campaign Promise Kept*, THE WASH. POST, Jan. 26, 1993, at A16.

134. For an eloquent explication of this point, see William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992). *Cf.* RAKOVE, *supra* note 77, at 218 (recounting Madison's concern that Confederation-era statutes were not only technically and substantively poor, but also much too numerous).

Indeed, Congress has imposed on itself practices which further heighten the requisite political consensus for changing the legal status quo. Most significantly, development of the filibuster has effectively raised the simple-majority requirement to a rule that 60 Senators need concur in bringing a measure forward. *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997). In the House, the incoming Republican majority of the 104th Congress responded to past failures of the balanced-budget amendment by adopting, on its first day, a procedural rule requiring a three-fifths vote to approve any income tax increase. *See* RULES OF THE HOUSE OF REPRESENTATIVES XXI(5)(c) (1995). Professor Lowi recently described these

power to define the legal status quo has shifted to the administrative delegees of regulatory power, who are not encumbered by the formal constitutional lawmaking process; now, the representation-rich Article I, §7 protocol works to impede efforts to undo or modify the work of those delegees.

One might look at these fundamental inversions of the representational plan and conclude that only a revived nondelegation doctrine can restore constitutional legitimacy.[135] However, for administrative law scholars who (whether from principle or practicality) do not contemplate broadscale dismantling of the regulatory enterprise, the problem is one of finding legitimacy in a world in which the original construct for democratic legitimation of public policymaking no longer operates in the originally contemplated way. It is beyond the scope of my project here to enter, or even recapitulate, the debate about "translating" constitutional principles to a radically changed world; hence I concede that I am, to some extent, leaping over a thorny theoretical thicket. Nonetheless, my proposition is that it is in some sense true to the original conception of representation to look, for legitimation, to multiple opportunities for the people to "speak" and be heard in the regulatory process. The Founding ideas (i) that no part of government specially and exclusively captures the will of the people, (ii) that the people exist in their political capacity outside the formal representative structures of government, and therefore (iii) that the ways in which they might participate in their own governance are not inevitably limited to those structures, may support a new understanding of how the regulatory enterprise achieves democratic legitimacy.

In this new understanding, legitimacy is not a state, formally constructed and essentially static, but rather an undertaking, inescapably multiphasic in form and evolutionary in nature.[136] It can be pursued,

practices as part of "a national governmental process whose operational code is action-prevention." Lowi, *supra* note 51 (manuscript at 21).

135. *See* Gary Lawson, *The Rise and Rise of the Administrative State,* 107 HARV. L. REV. 1231 (1994).

136. This distinction may resonate on an even deeper level with the "original understanding." Gordon Wood suggests that the intellectual revolution of the Founding was the ultimate American rejection of 18th century classicism, which "had sought to understand politics, as it had all of life, by capturing in an integrated, ordered, changeless ideal the totality and complexity of the world"—an ideal in which "there could be only potential energy, no kinetic energy, only a static equilibrium among synthetic orders . . . ." In its place came "the beginning of what might be called a romantic view of politics[,]" emphasizing "the piecemeal and the concrete in politics at the expense of order and completeness." "The Constitution," he concludes, represented "the end of the belief that the endless variety and perplexity of society could be reduced to a simple and harmonious system." WOOD, *supra* note 6, at 606.

simultaneously, on several levels of the regulatory process and at several moments on the regulatory timeline. It is not exclusively the prerogative of the central constitutional actors—the House, the Senate, the President, the Judiciary—but also can be furthered through the processes of regulatory decisionmaking and the ways in which bureaucracy is structured and enculturated. Moreover, if we do view legitimating opportunities broadly, we may be better able to account for the characteristics of collective decisionmaking—heterogeneity, complexity, evolution, and the need for both leading and following—for which we must account if "the will of the people" is to be more than a rhetorical slogan in a campaign furthering some particular regulatory agenda.

Just as, in this forum, I can only begin to suggest the theoretical underpinnings for such a reconceptualization, so I can only sketch some of the implications it might have. But perhaps the preliminariness of this sketch will be less frustrating because, if my reconceptualization is radical, the conclusion to which it leads me is fundamentally conservative: Much of what has happened in the last 30 years in administrative law has been good, and we ought to think carefully about the legitimacy implications of judicial decisions and reform proposals that would reverse or abandon those developments.[137]

A. Congress & the President

In the last three decades, Congress and the President have responded creatively to the derangement of the originally contemplated policymaking structure. The legislative veto, the increased use of substantive directives in appropriations measures, the construction of unconventionally situated and constituted agencies,[138] the use of

137. In fact, I do not consider my conception of legitimation to be radically discontinuous with other work in our field. For example, I see strong resonances with Peter Shane's argument against the unitary executive model of administrative control: "Virtually every plausible normative version of accountability seems to depend quite strongly on the availability of multiple pressure points within the bureaucracy, a diffusion of policy making influence, public dialogue, and a general fluidity in the value structure that guides the bureaucracy's decisionmaking." *Political Accountability*, *supra* note 22, at 212. More broadly, this way of thinking about legitimation complements—as a matter of basic philosophy, if not necessarily each implementing proposal—the functionalist, checks-and-balances approach to questions about allocation of power articulated in, for example, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984). And it accords with Tom Sargentich's argument that the various constitutional divisions and allocations of power represent a structural commitment to "the principle of dialogue." *See* Sargentich, *supra* note 25, at 732-38; *cf.* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 98 (1985) ("Responsiveness to the will of the people is not a unitary phenomenon that can be embodied in a single institution.").

138. Such as the United States Sentencing Commission.

Executive Orders to provide overarching direction to regulatory activity, the rise of the Office of Management and Budget, the adoption of the line-item veto—all represent either true innovations or significantly innovative expansions of existing control mechanisms. All are attempts to reposition the three principal representative voices of the people within a changed policymaking environment. The wisdom of such adaptations is obviously highly debatable, but the efforts of the judiciary to determine their legality has thus far been, almost invariably, disappointing.

The Court has tended to approach these questions half-blind to constitutional history and deaf to the exigencies of contemporary practice. It relies heavily on the Founders' concern with legislative aggrandizement and encroachment,[139] while forgetting the context in which those concerns were voiced. As the previous Part recounts, the states had reacted against the aggrandizement and encroachment of the British Executive by deliberately giving their legislatures virtually the full sweep of governmental authority. Their governors were stripped of powers (such as the appointment power) that the King had used to strengthen his hand with Parliament, denied powers (such as the veto) that could thwart the legislature's actions, and structured in ways (such as a powerful executive counsel) that minimized their political influence and power-base. An independent judiciary was absent. In a governmental regime with such singleminded legal and political focus, of course the legislature was (as Madison put it) "every where extending the sphere of its activity, and drawing all power into its impetuous vortex."[140] This, however, is emphatically not the regime of the Constitution—with its establishment of a politically and structurally powerful President and a carefully defined and protected judiciary. It can be perilously anachronistic to use the reasons why the Constitution rejected those first constitutional structures as the desiderata for resolving power questions that subsequently arise within its profoundly different structure. Rather than examining contemporary policy control mechanisms as they affect the relative position of constitutional actors who are the product of two centuries of radical constitutional "reform," the Court too often positions itself as if standing shoulder to shoulder with Madison and Hamilton, fighting the good fight against Anti-Federalist determination to retain a legislative-cen-

139. *See, e.g.*, Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 273-74 (1991); Bowsher v. Synar, 478 U.S. 714, 727 (1986); INS v. Chadha, 462 U.S. 919, 946-51 (1983); Buckley v. Valeo, 424 U.S. 1, 129 (1976).

140. THE FEDERALIST NO. 48 (James Madison).

tered political universe. And perhaps because it is locked in that 200 year-old time warp, it appears to forget the contemporary reality that much of the power to make public policy has passed, by delegation, beyond the ambit of the complex representational structure of the Article I lawmaking process.[141]

My point is to critique not the result in a case like *Chadha*—although I note with interest that some recent attempts to come to terms with the legitimacy of the administrative state arrive at a defense of the legislative veto[142]—but rather the methodology. And I am not replaying the intriguing but thoroughly ventilated debate about formalism vs. functionalism.[143] Rather, I am suggesting that the Court has failed to see such cases as presenting important issues about representation as well as about power: How do we politically construct the will of the people in a post-delegation world? How can, or must, the three traditionally privileged (though not exclusive) articulations of the people's voice assert their claim to direct public policy when the Article I, §7 rules for requiring consensus and overcoming dissent no longer control in the primary policy setting environment? This reconceptualization does not readily generate "right" answers in particular cases, but it renders presumptively "wrong" an analytical approach that allows only Article I ways of speaking the people's will while simultaneously permitting significant policymaking to go on outside the Article I process.

B. Judicial Review

Until recently, the story of judicial review in the modern era of administrative law was a story of expansion. For my purposes here, more important than the increasing *depth* with which agency decisions were scrutinized is the increasing *breadth* of the class who could call forth this scrutiny. Led by major reconceptions in standing jurispru-

141. When the Court does remember this fact—typically, in more mainstream administrative law cases that do not come packaged as major separation-of-powers issues—it tends toward the simplistic equation of democratic legitimation with presidential control over administration. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Chevon U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

142. *See, e.g.*, Greene, *supra* note 22, at 187-95; Peter B. McCutchen, *Mistakes, Precedent and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 30-40 (1994); *cf.* Eskridge & Ferejohn, *supra* note 134, at 540-43 (demonstrating how legislative veto restores the original Art. I, § 7 balance between Congress and President).

143. *See, e.g.*, Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

dence,[144] the entire range of justiciability doctrines opened up to accommodate a range of litigants far beyond the paradigmatic petitioner complaining of regulatory action, i.e., the individual or entity whose traditional liberty or property interest was endangered by regulation. Now, beneficiaries of regulation, as well as the regulated, possessed the key to the courthouse door. The expansion of judicial review has been increasingly controversial; now, it is often identified as a principal factor contributing to regulatory ossification.[145] Still, debates about the appropriate contours of judicial review in the next century will be incomplete unless they explicitly take account of its potential for contributing to the legitimation of the regulatory process.

The most basic—and least uncontroversial—sense in which judicial review contributes to legitimation is its role as enforcer of the rule of law. At the core, the judiciary ensures that government-as-agent-of-the-people does not transgress procedural and substantive limits imposed by the Constitution. Somewhat more broadly, judicial review keeps agencies acting "lawfully" within the bounds of their statutory mandate, although this function becomes more problematic when ambiguity in the statute is viewed as yet another area of delegation of policymaking power to the agency.[146] More broadly still, courts can

144. *See* PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1130-48 (9th ed. 1995).

145. *See, e.g.*, JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 93-95 (1995). The anti-review literature is canvassed in Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 764, 764-65 (1994). The concern expressed in these sources typically goes more to the *depth* of scrutiny (or the timing of judicial intervention) rather than the *breadth* of availability. *See infra* note 165 and accompanying text.

146. *See* Chevon U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). In commenting on a draft of this paper, Mark Seidenfeld offered the intriguing observation that citizens' trust in courts to ensure that agencies abide by the rule of law may reflect a misunderstanding of what courts actually do when they review administrative action—in which case, he questions whether such trust could function as legitimating. He was concerned about the layperson's failure to recognize that judicial review under open-textured statutes cannot be a value-neutral, "merely" legalistic enterprise. One might equally be concerned about a failure to appreciate that courts following *Chevron* will defer to agencies about what "the law" is. Either way, his comments raise an important question deserving more attention than I can give it here: To what extent is legitimacy a function of what citizens *believe* about their government, apart from its actual practice? *Cf.* HIBBING & THEISS-MORSE, *supra* note 5, at 125 (concluding, from study of public attitudes toward Congress, that citizen dissatisfaction is traceable as much to processes "endemic to open democratic government" as to perversions needing reform: "Americans love democracy but hate democratic procedures"). In the following subsections, I assert—using the work of psychologist Tom Tyler—that citizens' personal experience with the practice of government power has important implications for legitimation of the regulatory state. But determining the relevance of perceptions that do not accurately reflect institutional practice (or that fail to recognize the connection between a practice and ideological commitments or desired policy objectives) requires a full-blown theory of democratic legitimacy, which I readily admit is

enforce at least minimal standards of consistency, impartiality, attentiveness to relevant considerations, care in reasoning, and other dimensions of a nonarbitrary legal decisional process in a context in which government at least purports not to be acting in an overtly political mode.[147] This is the understanding of the courts' role that most easily conceptualizes the judiciary as yet another constitutionally empowered representative of the people—and judicial review as yet another mode in which the will of the people finds expression. The fact that judicial review is routinely and almost universally provided for in the regulatory statutes that emerge from the full Article I legislative process simply underscores its democratic pedigree.[148]

There is another, concededly more controversial, sense in which judicial review can contribute to legitimation. The key to the courthouse door brings with it power in the regulatory arena:

> To be sure, being permitted to make a complaint about agency behavior is a long way from having that complaint legally validated and judicially remedied. Still, from the agency's perspective, the very act of being haled into court and required to defend its action involves considerable costs. Hence, parties who are capable of imposing such costs at the *end* of the regulatory process become parties whose interests must be reckoned with *during* the regulatory process. In this sense, [judicial review] represents judicially-enhanced voice.[149]

This was one of the insights of the interest-representation movement in administrative law in the 1960s and 1970s and, I would sug-

beyond my scope. *See generally* Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 400-12 (discussing different models of legitimacy and the effect on them of citizen knowledge and perceptions about legal institutions).

147. *See* Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 975-79 (1997); *see also* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 18-21 (1997).

148. The Senate Judiciary Committee, reporting on the bill that became the APA, emphasized:

> Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified, its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

S. REP. NO. 79-752, at 26 (1945). *See also* H.R. REP. NO. 79-1980, at 41 (1946) ("The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it."); *cf.* Peter L. Strauss, *Revisiting* Overton Park*: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1324-25 (1992) ("Congress may choose widely to distribute the right to challenge agency behavior in court both as a means of assuring agency fidelity to its aims and as a reliable device for signaling to it when administration is going astray—as a substitute, as it were, for its own political oversight.").

149. STRAUSS, ET AL., *supra* note 144, at 1121.

gest, this insight was valuable to the enterprise of legitimation. The democratization of judicial review both flowed from, and contributed to, the democratization of agency processes discussed below: It empowered a greater range of citizens to participate directly in government decisionmaking—both immediately, through the act of judicial review itself as policer of government-acting-within-law, and mediately, through the enhanced role in the regulatory process that takes place in the shadow of judicial review.[150] At the same time, it brought with it many of the costs of direct, participatory democracy.[151]

Future decisions about the appropriate scope of judicial review obviously must take account of those costs—but they should also acknowledge its role in offering legitimation. More than thirty years ago, at the threshold of the modern era of administrative law, Louis Jaffe wrote, "The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."[152] If the last three decades have enhanced our appreciation of the costs of judicial re-

150. Louis Jaffe was one of the most eloquent proponents of this conception:

> It has now become a commonplace that the individual citizen in our vast, multitudinous complexes feels excluded from government. Thus, while governmental power expands, individual participation in the exercise of power contracts. This is unfortunate because the feeling of helplessness and exclusion is itself an evil, and because individuals and organized groups are a source of information, experience, and wisdom. It has been remarked that administrative agencies are sometimes captured by particular interests. This assertion has been, in my opinion, somewhat overdone, but there can be no question that there is danger that officials and their staffs will become attached to certain positions and to certain accommodations which narrow their visions. For these reasons procedural devices, which enable citizen groups to participate in the decision-making process and to invoke judicial controls, are very valuable. . . . The judicial process as a vehicle for self-government is exemplified in [several important early cases adopting the interest representation model]. From the very beginning, both our Constitution and our practice has sought to protect the individual *qua* individual and *qua* member of a minority from the abuse of power by the majority or by government in the name of the majority, despite the fact that majority rule through representation is the central institution of our democracy. Furthermore, democracy in our tradition emphasizes citizen participation as much as it does majority rule. Citizen participation is not simply a vehicle for minority protection, but a creative element in government and lawmaking. The usual . . . citizen suit is thoroughly consistent with the primacy of majority rule. The issue will be the statutory authority of the official action, and the lawsuit itself will be prescribed by statute. [These cases] emerge, then, as excellent examples of the lawsuit as a form of citizen participation within a framework established by majority rule.

Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1044-45 (1968). For a more contemporary presentation of adjudication as a participatory democratic process, see Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997).

151. *Cf.* Strauss, *supra* note 148, at 1327 (arguing that judicial review-as-democratic-surrogate fails to remedy existing power disparities among groups and creates additional costs and biases).

152. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965).

view, they have also strengthened this observation about its value within American legal-political culture. The expansion of regulatory authority went hand-in-hand with the expansion of judicial review; in this setting, it will be hard to avoid collapsing "is" with "ought."[153] The interest-representation phase of administrative law wrote broadly available judicial review into the fabric of contemporary regulation. Whether one denigrates this as bootstrapping, or regards it more neutrally as simply a path taken in the evolution of a complex socio-political organism, the citizen expectations that ensued are real—and should be attended to.

Finally, whatever one sees as the overall "best" level of judicial review, a legitimation perspective would flag as particularly dangerous the Court's recent trend towards asymmetrical cutbacks in the availability of review. Decisions in the areas of standing, ripeness, and reviewability all signal a raising of the justiciability threshold for regulatory beneficiaries, without a comparably constraining adjustment for the regulated community.[154] Once we understand that access to judicial review translates into power in the regulatory process, it becomes clear that asymmetrical barriers privilege certain kinds of voices while condemning other kinds to being heard only at the agency's sufferance. Whatever the optimal level of participatory democracy in the regulatory process, skewed empowerment—particularly when accomplished by the judiciary without clear legislative direction—is the worst outcome from a legitimation perspective. This is so even with respect to the more basic and uncontroversial legitimation function of review, i.e., policing the rule of law. Only by insisting that traditional common-law rights have a claim to judicial protection qualitatively superior to the claim of interests created by regulatory statutes, can we fail to see the loss of legitimacy that comes from al-

153. I have previously argued that there is indeed a necessary normative relationship between expanded regulatory delegation and judicial review, *see* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487-98 (1989), but my point here does not rest on that argument being accepted.

Several scholars have begun to counter the ossification-based critique of judicial review by urging that review of regulatory decisionmaking furthers important democratic values of deliberation and participation. *See, e.g.,* Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1279-82, 1285-87 (1994); Rossi, *supra* note 145, at 806-26; Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997); Mark Seidenfeld, *A Civic Republicanism Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1570 (1992).

154. *See* Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994); Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43 (1993); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990); Heckler v. Chaney, 470 U.S. 821 (1985); Block v. Community Nutrition Inst., 467 U.S. 340 (1984).

lowing only some citizens to invoke the protections of legality and rationality.[155]

C. *Administrative Procedures*

Through the middle of this century, administrative law narrowly conceptualized the kinds of citizens who were entitled to a direct voice in regulatory policymaking. Because the central legal question posed by the administrative state was still perceived as setting the permissible limits of government invasion of private autonomy, rights of participation in agency proceedings were typically recognized only in those whose common-law property or liberty interests were threatened. This conception was radically altered in the 1960s and early 1970s:

> The emergence of powerful, broadly-based movements in the areas of civil rights, health and safety, consumer protection, and the environment redefined the regulatory landscape. Government was called upon to take an affirmative role in ensuring social justice and enhancing physical and economic well-being. New regulatory initiatives were undertaken; older regulatory programs faced demands that new considerations—such as environmental protection and equal opportunity—be factored into the policymaking calculus. Yet, at the same time as government was taking on ambitious new regulatory agendas, questions were being raised about the ability of the administrative process, as traditionally structured, to in fact discern the "public interest." Political scientists and grassroots advocates alike charged that agencies had been "captured" by the interests they were supposed to regulate. Legal scholars questioned the legitimacy and wisdom of standardless discretionary power exercised through informal, often closed, administrative processes. Skepticism about the quality of policy that emerged from agencies' "standard operating procedure," in conjunction with the rise of organized and vocal advocacy groups, produced a new emphasis on the interests of "the public" in the regulatory process.[156]

The interest representation movement responded to these developments.[157] Its principal legacy was a transformation of regulatory procedure that opened rulemaking (and, to a lesser but still significant

155. This point has been developed most fully by Cass Sunstein. *See, e.g.*, Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries", and Article III*, 91 MICH. L. REV. 163 (1992). The highly undesirable effects of asymmetrical contraction of judicial review are recognized by even some of the most eloquent advocates of a diminished judicial role in the regulatory process. *See, e.g.*, Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife: *Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993).

156. STRAUSS, ET AL., *supra* note 144, at 464-65 (footnotes omitted).

157. *See* Stewart, *supra* note 2, at 1748-62.

extent, administrative adjudication) to broad citizen participation.[158] A comparable broadening of access to judicial review solidified this transformation.

This democratization of agency processes was an innovative response to accelerating changes in the scope and meaning of government that greatly strained the theory and practice of representative democracy. And it was a type of response capable of having positive legitimating consequences. Psychologist Tom Tyler's pathbreaking work on the question why people obey the law suggests that citizens' ability to accept government action as "fair" and hence legitimate—and, particularly, their ability to identify positively with the legal-political system over the long term—depends as much (if not more) on the process by which authority is exercised than on specific substantive outcomes.[159] Professor Tyler's research shows that an important component of "fair" process is the opportunity for participation, an opportunity that must include not simply the chance to "state your case" but also the assurance that the decisionmaker will actually con-

158. Much of this transformation occurred as the courts of appeals glossed provisions of the APA—particularly § 553(c), with help from § 706(2)(A). *See, e.g.*, United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240 (2d Cir. 1977). Congress in the period seemed enthusiastic about such developments, as it incorporated many of these procedural changes as "hybrid" rulemaking requirements in new regulatory statutes. *See, e.g.*, Federal Trade Commission Improvement Act of 1975 § 202(a), 15 U.S.C. § 57a (1994 & Supp. 1995). The analogous, though less extensive, broadening of administrative adjudication—principally through the creation of expanded intervention rights—had a less clear basis in the text of the APA. *See, e.g.*, Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

159. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990) [hereinafter WHY PEOPLE OBEY]; E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830 (1989) [hereinafter *The Psychology of Procedural Justice*]; *see also* Tom R. Tyler, *Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 J. PERSONALITY & SOC. PSYCHOL. 333 (1987) (attempting to determine why people desire "voice" in exercises of government authority when what they say will have little impact on the outcome).

This work built on, but departed substantially from, earlier work on procedural justice by Thibaut and Walker, which had argued that people value process only as a means of exerting control over outcome. *See, e.g.*, JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975). Thibaut & Walker's work suggests a "control model," in which people are motivated by resource considerations and hence view process only instrumentally; Tyler & Lind's is a relational model, in which people's reactions to groups and group authorities spring from their interest in understanding the interpersonal connection between themselves and the group. It does not argue that people ignore resource issues, but rather that they take the long-term view that if group authorities are fair, neutral, benevolent, and protective of the individual's rights and status, everyone will receive a reasonable level of resources from the group over time. *See* Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCHOL. 850, 852 (1994); *see also* Tom R. Tyler et al., *Understanding Why the Justice of Group Procedures Matters: A Test of the Psychological Dynamics of the Group-Value Model*, 70 J. PERSONALITY & SOC. PSYCHOL. 913 (1996) [hereinafter *Why the Justice of Group Procedures Matters*]. This conception is discussed further in subpart D on Bureaucratic Culture.

sider these statements even if such consideration does not change the outcome.[160] The procedural innovations of the interest-representation movement—which were directed at ensuring that the administrative policymaker (i) provides opportunities to hear from citizens and then (ii) demonstrates publicly that it has attended to and taken some account of the comments received—find a comfortable home within this understanding of procedural justice.[161]

And yet, the experience with administrative-procedure-as-participatory-democracy can hardly be judged a striking success. From one perspective, pure participation rights (especially when accorded without any resource subsidy to facilitate their meaningful use) have often not been sufficient to enhance the voice of poorly organized, politically powerless citizens.[162] Indeed, these rights—available, as they are, indiscriminately—simply add weapons of delay and obstructiveness to the arsenal of the well-endowed and organized who are opposed to regulation.[163] From a more neutral managerial perspective, a procedural commitment to broadly participatory policymaking processes is highly costly, especially when the agency is expected not merely to allow participation but also to attend to it by either changing its own position or explaining why it has not been persuaded. Indeed, there is some suspicion that the creation of an open and broadly participatory phase in rulemaking has simply driven the "real" policy-crafting interchanges to an earlier point in the process—when the proposed rule is being formulated for comment—which is still formally closed to public participation and practically subject to very differen-

160. *See* WHY PEOPLE OBEY, *supra* note 159, at 163.

161. Professor Tyler's work has obvious implications for another controversial area of modern administrative law doctrine: procedural due process. Approaching that area from a legitimation perspective suggests a set of questions that I will not even begin to explore here. *Cf.* Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 265-78 (1991) (arguing, inter alia, for a conception of due process built on the recognition that when "a citizen's interaction with the state becomes an experience of frustration, self-loathing or despair, we are individually and collectively diminished").

162. *See, e.g.*, Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 508 (1985). In a slightly different context Joel Handler, who writes with unique insight about issues of dependence, discretion, and empowerment, explains:

> Despite the changes in procedural law, most dependent people most of the time are not able to take advantage of their rights. . . . [To use the legal system,] [p]eople have to know that they have been harmed, they have to blame someone other than themselves, they have to know how to pursue a remedy, they have to have resources to pursue that remedy, and the benefits that they expect to gain from winning have to outweigh the expected costs. . . . [M]ost of these conditions present formidable obstacles to dependent people most of the time in their dealings with government bureaucracies.

Joel F. Handler, *The Politics of Structure: Decentralization and Empowerment*, 13 WINDSOR Y.B. OF ACCESS TO JUST. 239, 240 (1993).

163. *See, e.g.*, Strauss, *supra* note 148, at 1327.

tial access.[164] The perception that these procedural innovations have increased the time, expense, and complexity of administrative policymaking without comparably increasing the quality of the ultimate product has led critics to place these developments high on the list of factors causing regulatory ossification.[165]

My purpose here is not so much to defend the particular procedural paths that interest representation took us down, as it is to urge that discussions about modifying those paths explicitly consider the legitimating potential of democratizing administrative policymaking processes. Expense and delay are very real and appropriate concerns, but surely they cannot be dispositive, for democracy is by hypothesis a slow and costly form of social ordering. Making public policy in a heterogeneous society with an ambitious regulatory agenda inevitably implicating complex commitments—the reconciliation of which will necessarily involve an evolving process of contextualizing and adjustment—is not likely to be a high-efficiency undertaking. To be sure, we might decide that, in certain programs or certain circumstances, policymaking ought to be predominantly a matter of public officials' leading rather than following. Although we may have lost an earlier generation's faith in administration as dispassionate science, we continue to acknowledge the importance of technical expertise and professional experience; a very contemporary elaboration on this is the suggestion that we conceptualize agencies as a source of republican deliberative wisdom.[166] In such circumstances, participatory democracy is indeed the "wrong" model for crafting administrative processes.[167] But let us explicitly recognize that legitimacy is on the table. If we choose to insulate policymakers from direct democratic interchange because of a conclusion that the public interest will best emerge from either the application of special expertise or the capacity to engage in reflective deliberation, let us understand that we are making deeply normative choices among possible modes of legitimation.

164. *See* CORNELIUS M. KERWIN, RULEMAKING 200 (1994) (surveying interest groups and finding that "[c]oalition formation and informal contacts *before the notice of proposed rulemaking is issued* are perceived to be the most effective" techniques for bringing their concerns to the agency's attention) (emphasis added).

165. *See* sources cited *supra* note 145.

166. *See, e.g.,* Seidenfeld, *supra* note 153. Indeed, as Peter Strauss argues in this Symposium, reports of the death of our faith in administrative expertise and technocratic policymaking may be greatly exaggerated. *See* Strauss, *supra* note 147, at 985.

167. For a thoughtful argument in this vein, see Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997).

And, if we are not persuaded that either the "expertise" or the "reflective deliberation" mode is universally appropriate, then the sensible inquiry would seem to be how we adjust democratized regulatory procedures to achieve their optimal benefit. The Negotiated Rulemaking Act[168] can be seen as an attempt at this sort of adjustment. Among other things, it responds to concerns that the public notice-and-comment process postdates the real "insiders-only" act of policy definition, by establishing a participatory process for crafting the proposed rule. It imposes on agencies an overtly inquisitorial duty to ensure that all affected interests are represented[169] (backed up by a separate, fast-track notice and comment process on this precise issue)[170] and directs them to provide not only technical support for the participants but also funding for those whose involvement is necessary but otherwise unlikely.[171] To be sure, the meaning-in-fact of these provisions depends largely on the agency's sympathetic and aggressive engagement,[172] but the legal framework for a strong, representative-democratic procedural model is present.[173]

The jury is still out on whether what typically ensues from "reg neg" is closer to the best form of republican deliberation (in which representatives of groups of citizens meet, discuss their needs and concerns, educate and are educated, reconcile and redefine their commitments, and achieve some resolution that represents a common good which is more and better than the sum of individual preferences[174]) or to the worst form of interest-group politicking (in which self-interested actors horse-trade and log-roll their way to an acceptable deal which serves the public interest only through some improbable fortuity[175]). Early studies of this new procedure for policymaking sug-

168. 5 U.S.C. §§ 561-70 (1994 & Supp. II 1996), *renewed and indefinitely extended by* The Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996).

169. *See id.* §§ 563(a)(2), (3), 565(a).

170. *See id.* § 564.

171. *See id.* §§ 565(c), 568(c).

172. Judicial review on these issues is explicitly made unavailable. *See id.* § 570.

173. The framework contemplates *representative* democracy because affected interests must participate through a spokesperson rather than having the right, as in the main notice-and-comment process, to personal participation. And the spokesperson is appointed by the agency after a form of consultation (the fast-track comment process) rather than elected by those interested. Hence, the species of representation resembles the class action more closely than the House of Representatives.

174. *See, e.g.*, Neil Eisner, *Regulatory Negotiation: A Real World Experience*, 31 FED. B. NEWS & J. 371 (1984); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982).

175. See, for example, the concerns expressed in Rose-Ackerman, *supra* note 153; William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards,* 18 ENVTL. L. 55 (1987).

gested, not surprisingly, that "it depends"—on the type of regulatory issue, the agency's success in identifying all relevant interests, the experience of the negotiators, and the skill of the facilitator, etc.[176] More recently, extensive empirical studies that compare negotiated and conventional rulemaking at EPA are affording better purchase for assessing reg neg's potential.[177] At least some researchers have concluded that not only does negotiated rulemaking fare as well, or better, than conventional rulemaking on several measures of "success," but also participants in this process have experienced it as offering superior opportunities for participation in and education about the regulatory enterprise.[178]

D. Bureaucratic Culture

Taking a page from the private sector's book, the federal government has self-consciously entered the era of "total quality management" and "business process reengineering."[179] This approach urges agencies to adopt as an important (though not exclusive) dimension for evaluating their own performance whether they are delivering high quality services at the lowest possible cost. It emphasizes such factors as customer requirements and satisfaction, effectiveness and adaptability of service delivery systems, employee morale and sense of involvement in the institution's mission, training and performance feedback, the role of leadership at various levels, and management commitment to teamwork and establishing an institutional culture supportive of quality.[180] It pursues a vision of "legendary customer service."[181] It focuses on the presence and strength of various "en-

176. *See, e.g.*, ADMINISTRATIVE CONFERENCE OF THE U.S., NEGOTIATED RULEMAKING SOURCEBOOK 37-65 (2d ed. 1995).

177. *See* ADMINISTRATIVE CONFERENCE OF THE U.S., AN EVALUATION OF NEGOTIATED RULEMAKING AT THE ENVIRONMENTAL PROTECTION AGENCY: PHASE I (1995) (Dr. Cornelius M. Kerwin & Dr. Laura Langbein, Reporters). A follow-up, PHASE 2, is expected in 1997. *See also* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 1997 DUKE L.J. (forthcoming 1998).

178. *See* ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 177. *But see* Coglianese, *supra* note 177 (disputing conclusions about relative success, and at least questioning civic educative value).

179. *See* CENTER FOR INFO. MANAGEMENT, NAT'L ACADEMY OF PUB. ADMIN., REENGINEERING FOR RESULTS (1994) (Dr. Sharon L. Caudle, Reporter). The private sector's earlier embracing of such integrated management philosophies can be attributed significantly to W. EDWARDS DEMING, QUALITY, PRODUCTIVITY, AND COMPETITIVE POSITION (1982).

180. *See, e.g.*, REENGINEERING FOR RESULTS, *supra* note 179; Joseph Sensenbrenner, *The Fourth Revolution in Government Change*, J. QUALITY & PARTICIPATION, Dec. 1995, at 90; A. Keith Smith, *Total Quality Management in the Public Sector*, 26 QUALITY PROGRESS 45 (June 1993).

181. Smith, *supra* note 180, at 48.

ablers" that determine whether the organization succeeds in "produc[ing] customer and stakeholder satisfaction, employee satisfaction, and mission results."[182]

At first glance, it may be hard to see what this development—which, to the legal ear, speaks in the strange (at times, jarring) patois of management and human resources—has to do with the constitutional status of the regulatory enterprise. The quest for efficient and effective customer service is all well and good, but what could it have to do with democratic legitimation?

For those who thought about public administration during and immediately after the democratic watershed of World War II, the answer was, "Quite a bit." Writing in 1942, David Levitan (prominent contributor to the early intellectual development of the field of public administration in general, and government ethics in particular) insisted, "A civil servant in a democracy cannot properly discharge his duties and responsibilities unless he has a firm appreciation of the meaning of democracy, of the dignity of the citizen, and of the concept of being a servant of the people."[183] Paul Appleby, proposing an ethical framework for public administrators in 1947, argued:

> "[P]ublic administration" . . . is not merely "management" as ordinarily treated in technical terms, or "administration" as ordinarily treated with only a slightly broader meaning. It is public leadership of public affairs directly responsible for executive action. In a democracy, it has to do with such leadership and executive action in terms that respect and contribute to the dignity, the worth, and the potentialities of the citizen. . . . Good government must be realistic, but it must be idealistic too. It must respect and nurture and serve the people whose instrument it is.[184]

Insisting upon a responsibility to "support and contribute to the reality of a democratic society" through, inter alia, "social understanding, sympathy, and regard for the individuality of every citizen,"[185] Appleby identified the central obligation of public administrators as ensuring "that government shall be so devoted and so considerate that citizens generally need never fear it."[186]

This early and imperfectly developed linkage between democratic legitimacy and dedicated, care-taking public administration is pursued

182. REENGINEERING FOR RESULTS, *supra* note 179, at 8.
183. David M. Levitan, *The Neutrality of the Public Service*, 2 PUB. ADMIN. REV. 317, 319 (1942).
184. Paul H. Appleby, *Toward Better Public Administration*, 7 PUB. ADMIN. REV. 93, 95, 99 (1947).
185. *Id.* at 94.
186. *Id.* at 99.

in the conception of representative-democratic government as a stewardship for the people. Trying to reinvigorate the commonly invoked metaphor "Public service is a public trust," the ABA Committee on Government Standards reasoned:

> The fiduciary, or steward, is one to whom power is given in order that his knowledge and skill can be brought to bear for the benefit of another. This defining characteristic of stewardship illuminates the characteristic of government service that has definitive ethical significance: the entrusting of power by "We, the People" to those who govern for us. Because we understand ourselves to be a legitimately self-governing People, we recognize that this transfer of power is neither a desperate confession of inability to rule ourselves, nor an unconditional submission to some outsider's superior claim to rule us. Those who receive the power to govern have no inherent right to it. Rather, the power that a free and willing citizenry gives to those who govern comes indelibly impressed with the duty to serve the interests of that citizenry. And, just as the power need not have been given, so it need not have been accepted. To take the power is to take on the responsibility of service with which it is invested.[187]

From a somewhat different perspective, Professors Mitchell and Scott, reviewing academic literature and the popular press to examine "the public's increasing distrust and perceived lack of confidence in American administrative leadership," conclude that "[l]egitimacy resides in people's beliefs that their leaders are competent (experts), are personally compelling and dynamic (entrepreneurial), and are stewards (trustworthy)."[188] On this last characteristic they emphasize,

> Stewardship pertains to the legal and moral responsibilities of a person who is responsible for managing the property of another. It is based on the notion that administrators must display the virtues of trust and honorableness in order to be legitimate leaders .... Stewardship includes much more than legalities.[189]

In a similar vein, philosopher Annette Baier defines "trust" as "letting other persons (natural or artificial, such as firms, nations, etc.) take care of something the truster cares about, where such 'caring for' involves some exercise of discretionary power."[190] Hence, she argues, the moral basis of trust is destroyed not only when those entrusted with power act deliberately against our interests, but also when they act incompetently or negligently and "conceal these features of their

187. ABA Comm. on Gov't Standards, *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287, 291-92 (1993) (Cynthia R. Farina, Reporter).

188. Terence R. Mitchell & William G. Scott, *Leadership Failures, the Distrusting Public, and Prospects of the Administrative State*, 47 PUB. ADMIN. REV. 445, 446 (1987).

189. *Id.* at 448.

190. Annette Baier, *Trust and Antitrust*, 96 ETHICS 231, 240 (1986).

activities from us by the pretense that whatever happened occurred as a result of an honest and well-meaning exercise of the discretion given to them."[191]

This fairly abstract, theoretical linkage between democratic legitimacy and the competent, care-taking use of government power may be made more concrete by considering, again, the work of Tom Tyler. Professor Tyler concluded that citizens' "judgments about the social dimensions of the experience [with government officials], such as ethicality, weigh very heavily in assessments of procedural justice."[192] Specifically, he found that (in addition to the opportunity for participation, discussed earlier) the following non-outcome-dependent dimensions of a citizen's interaction with government affect whether she perceives the exercise of authority to be legitimate: (i) her belief that the decisionmaker is honest and unbiased; (ii) her conclusion that she was treated politely and with respect for both her rights and herself as a person; (iii) her feeling that the official was responsive and willing to help her; and (iv) her belief that the official wants to be fair—an issue of motivation apart from basic honesty and impartiality, which Professor Tyler describes as a security in government's essential benevolence and in the likelihood that citizens will receive help if they have problems in the future.[193] His more recent work develops further the hypothesis that this sort of "fair" treatment by government officials enhances identification with, and commitment to, the legal-political system. Because authorities represent the group, and express its norms and values, treatment by a representative authority figure can become a symbol to the individual of her status within the group; this in turn shapes her response to the group.[194]

Professor Tyler argues that the process characteristics listed above communicate to citizens important information about their situation vis-a-vis their government. Neutrality (a belief in honesty and impartiality) allows the citizen to transcend a specific, unfavorable outcome in favor of a longer-range conviction that she will benefit from fair administration over time. Trust (a feeling that the official was responsive and motivated to help in the future) allows the citizen confidence in how she will be treated in future encounters. The ac-

191. *Id.* at 239-40. My colleague Greg Alexander points out that this understanding is explicitly incorporated in the law regulating "real" trusts, in which trustee liability is based not on outcomes but on process pathology.

192. WHY PEOPLE OBEY, *supra* note 159, at 163. Professor Tyler uses the term "ethicality" in a somewhat unusual way to signify "politeness and . . . concern for one's rights." *Id.* at 152.

193. *See id.* at 163-64.

194. *See Why the Justice of Group Procedures Matters*, *supra* note 159, at 914.

knowledgement of standing (polite and respectful treatment) assures the individual that she enjoys high status within the group and that her rights therefore will be honored.[195] In sum, "good" treatment of citizens—treatment that signals care, responsiveness, courtesy, respect, willingness to help—has legitimating value even if (perhaps especially if) the ultimate decisional outcome is negative. It confirms that the citizen is a valued member of the legal-political community and so strengthens her sense of identification with the government that supposedly represents her.[196] If this model of procedural justice is correct, then administrative law has a deeper stake than we have fully appreciated in recent "good government" efforts to transform the bureaucratic culture.[197]

CONCLUSION

"[T]he living must settle their own affairs."[198]

In the extraordinary period between revolution and ratification, the Founders used theory, practical wisdom, and conscious experimentation as the basis for constructing American representative government. Over the course of this century, we have been engaged in reconstructing American government. It is tempting to say that ours is the harder task: Americans now expect so much more from govern-

195. *See The Psychology of Procedural Justice*, *supra* note 159, at 831.

196. *See id.* at 837.

197. My suggestion that administrative law has not fully recognized its stake in the "reinventing government" initiative would be seconded by Jerry Mashaw, but his is a far more pessimistic assessment: "[The National Performance Review's] basic managerial presuppositions are on a collision course with administrative law's contemporary understanding of legality in administration." Jerry Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 415 (1996). Only a singularly foolish person would take lightly Professor Mashaw's predictions about the consequences of institutional procedural reform. I would suggest, however, that the "collision" he foresees may not be the unalloyedly bad thing that his metaphor implies. Administrative law's emphasis on "legality in administration," while centrally important to legitimating the regulatory state (as I argue in subpart B above), has not been sufficient to fill the legitimacy vacuum. The same point can be made about political oversight of regulatory programs, which he predicts will be weakened by the devolution of authority contemplated in reengineering's emphasis on empowering employees throughout the bureaucracy. Perhaps collision is a necessary prelude to a newly constructed understanding of how we find/create legitimacy for administrative government. Thus, I respectfully disagree that "the managerialist perspective . . . fails to understand that . . . in government, the process is the product[,]" *id.* at 412, or that it makes the "category mistake [of] confusing citizens with customers." *Id.* at 413. Rather, the managerialist perspective invites us to reexamine our criteria for a "good" process, while the equation of citizens with "customers" (while a more mercantile model than some of us might ideally prefer) encourages us to ask difficult but essential questions about whom regulatory programs actually or appropriately serve. Professor Mashaw rightly questions whether current reengineering efforts *have* engaged in this sort of self-conscious reexamination and questioning. But such a failure would simply mark out an area in which scholars can productively assist in the legitimation enterprise.

198. Easterbrook, *supra* note 18, at 313.

ment, both in the scope and complexity of its undertakings and in the immediacy, visibility, and broad accountability of its performance. But whether this sense of relative difficulty be fact or mere historical myopia, we build on what the Founders learned and we can use the tools they found apt to the undertaking. I have argued here that the original scheme for democratic-republican policymaking employed a carefully contrived, multivoiced representational construct. If that construct is no longer sufficient, our efforts to supplement it ought to respect this fundamental structural choice in favor of polyphony—if not for principled reasons of constitutional fidelity, then in practical recognition of the challenges of reflecting, and creating, the consent of the governed in post-industrialized American society.

In this light, I have suggested that many of the "instincts" of administrative law in the last thirty years have been basically right, and argued that our ongoing efforts to evaluate and refine those political and regulatory innovations should proceed with a conscious awareness of their legitimating potential. I concede that this is not a neat solution to the legitimacy problem. Instead of a "simple and unambiguous" answer,[199] it contemplates a contestable, never-quite-finished process of adaptation and adjustment. It asks us to forego the drama of discovering a single legitimating savior, in favor of incremental experimentation and improvement in the multitude of "ordinary" political and administrative processes and structures. At the same time, however, this solution seems to me fundamentally true to the animating spirit of contemporary administrative law, which has always recognized—though perhaps imperfectly—that in such seemingly prosaic work, we pursue constitutionality as well as competence.

199. *Cf.* Lessig & Sunstein, *supra* note 7, at 119 ("The belief in a strongly unitary executive has considerable appeal. It is simple and unambiguous.").